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NARRATIVE OF IMPORTANT DATES IN THE DISTRICT COURT

March 8, 1967 Complaint; Application for Convening of Three-Judge District Court; Memorandum of Points and Authorities in Support of Plaintiffs' Application for the Convening of a Statutory Three-Judge Court Pursuant to 28 U.S.C. §§ 2282 and 2284; and Motion for Preliminary Injunction (Three-Judge Court).

March 10, 1967 Order for Correction of Complaint.

March 31, 1967 Defendants' Motion to Dismiss, and Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction; Defendants' Memorandum of Points and Authorities with respect to Plaintiffs' Application for the Convening of a Statutory Three-Judge Court.

" Plaintiffs' Supplemental Memorandum of Points and Authorities in Support of Plaintiffs' Application for the Convening of a Statutory Three-Judge Court Pursuant to 28 U.S.C. §§ 2282 and 2284.

" Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Preliminary Injunction.

April 4, 1967 Oral argument before The Honorable Hart D. J.

April 7, 1967 Opinion and Order of the District Court denying the Application for a Three-Judge Court, dismissing the Complaint and denying the Motion for Preliminary Injunction.

April 7, 1967 Notice of Appeal.

GENERAL DOCKET
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 20897

Date

Filings—Proceedings

- 4-7-67 Certified original record and clerk's copy of transcript of proceedings (3 Volumes) (n-2)
- 4-10-67 4-appellants' motion for summary reversal of order and judgment of District Court, to waive printing of the record and filing of briefs, for leave to proceed on the original record, and for an immediate hearing and 3 folders of exhibits (p-9)
- 4-10-67 Per Curiam order denying appellants' request for immediate hearing; responsive pleadings shall be filed by the parties in accordance with Rule 31. Bastian, Sr. CJ; Tamm & Leventhal, CJ
- 4-14-67 4-appellee's opposition to motion for summary reversal of order and judgment and to dispense with filing of briefs (p-14)
- 4-20-67 10-appellants' reply to appellees' opposition to motion for summary reversal and dispensing with filing of briefs. (Fiat of Chief Judge Bazelon) (p-19)
- 4-24-67 Letter from clerk to counsel regarding preparation for argument.
- 4-27-67 Argued before Bazelon, Chief Judge, and Burger and Leventhal, Circuit Judges on appellant's motion for summary reversal. On motion of Lloyd N. Cutler, Bruce Bromley and Thomas D. Barr, members of the bar of the Court of Appeals of New York were allowed to argue, pro hac vice, for appellees
- 4-27-67 Per Curiam order denying appellants' motion for summary reversal; waiving Rule 16 and appeal shall be heard on the original record in lieu of filing a printed joint appendix; denying appellants' motion to dispense with the filing of briefs; directing counsel to confer with the

Date

Filings—Proceedings

- clerk to establish a briefing schedule; authorizing clerk to fix time for filing briefs allowing parties such times as is reasonably necessary to present the issues on appeal herein; briefs may be filed in xeroxed or mimeographed form in lieu of printing same; directing clerk to schedule case for argument as soon after briefs are filed as the business of the court will permit. CJ, Bazelon; Burger & Leventhal, CJ
- 5- 4-67 4-appellants' motion with respect to order of the court dated April 27th (p-4)
- 5- 8-67 Designation of appellants for record for use on certiorari (m-8)
- 5- 8-67 2-appellants' motion to authorize clerk to transmit record to Supreme Court (m-8)
- 5- 9-67 4-appellees' response to motion with respect to order of court of April 27th (p-9)
- 5-10-67 Order authorizing clerk to transmit original record to the Supreme Court for use in connection with a petition for writ of certiorari
- 5-10-67 Certified record prepared
- 5-10-67 Per Curiam order that the provisions of the order of April 27th shall be deemed to have lapsed; extending appellants' time for filing brief for a period of 40 days from date hereof provided that appellants shall be entitled to 15 days from the date of the Supreme Court's disposition of their petition for certiorari; appellees' brief and appellants' reply brief, if any, to be filed within time permitted by Rule 18; staying this order forthwith if the Supreme Court grants petition for certiorari; denying without prejudice appellants' motion to stay to the filing of a motion for advancement of oral argument after brief is filed; either party may seek further relief. CJ, Bazelon; Burger & Leventhal, CJ
- 5-11-67 Original record hand-delivered to Supreme Court
- 5-11-67 Receipt returned from Clerk, Supreme Court

Date	Filings—Proceedings
5-15-67	Notice from Clerk Supreme Court of filing of petition for certiorari on May 13th (SC Misc. 1386 OT 66)
6- 2-67	3-Appellants' motion to file petition for writ of certiorari in lieu of brief pursuant to order of 5-10-67 (p-2 on counsel for appellees; m-2 to pro hac vice)
6- 5-67	Certified copy of order of the Supreme Court denying petition for writ of certiorari
6- 9-67	4-appellees' memorandum with respect to appellants' motion to file petition for writ of certiorari in lieu of brief (p-9)
6-12-67	Certified record returned by Clerk, Supreme Court
6-12-67	Certified original record returned by Clerk, Supreme Court
6-19-67	Per Curiam order denying appellants' motion for leave to file appellants' petition for writ of certiorari in lieu of appellants' brief; counsel for appellants may file 25 copies of appellants' brief in mimeographed or xeroxed form as previously provided in order of April 27th; brief in all other respects shall conform with the General Rules of this court and shall include a statement of points and statement of questions presented; counsel for appellants are requested to discuss the case of <i>Dombrowski v. Eastland</i> 87 S.Ct. 1425 (May 15, 1967) in their briefs; Court will consider a reasonable application for extension of time and for enlargement of the permitted length of their brief. CJ. Bazelon; Burger & Leventhal, CJ.
6-21-67	3-appellants' motion for leave to file, time having expired, motion for extension of time to file brief (m-20)
6-27-67	Order extending appellants' time for filing their brief to July 5th; appellants' brief is not to exceed 75 pages

Date	Filings—Proceedings
7-10-67	5-Appellants' motion for leave to file brief, time having expired (m-9)
7-12-67	Order granting appellant's motion for leave to file brief, time having expired
7-12-67	25-appellant's brief and service (m-9)
8-16-67	4-appellees motion to exceed 50 page limitation for brief and to waive Rule 17(e) (p-16)
8-21-67	Order granting appellees' motion to exceed 50 pages limitation for brief and to waive Rule 17 (e); appellees request to file a brief of 80 pages. Robinson, CJ
8-21-67	25-brief for appellees and service
8-21-67	7 copies Xeroxed material for informal joint appendix (p-21)
8-21-67	25-Compilation of English and American Historical Material from 15th Century, etc.
8-30-67	4-appellees motion to enlarge time for oral argument
9-12-67	Order allowing one hour for each side for oral argument
9-12-67	4-appellant's motion for special leave for more than two counsel to participate in oral argument in behalf of appellants (m-12)
9-13-67	Order allowing appellant special leave for more than two counsel to present oral argument for appellant
9-15-67	Argued before Burger, McGowan and Leventhal; On motion by Mr. Frank D. Reeves, Mr. Arthur Kinoy, a member of the bar of the Court of Appeals of New York was allowed to argue pro hac vice, for appellants; On motion of Mr. Lloyd N. Cutler, Mr. Bruce Bromley, a member of the bar of the Court of Appeals of New York was allowed to argue pro hac vice, for appellee's; On motion by Mr. Lloyd N. Cutler Messrs. Thomas D. Barr, John R. Hupper and Jay E. Gerber, all members of the bar of the Court of Appeals for New York were introduced to the court pro hac vice, but did not argue for appellees.

Date	Filings—Proceedings
2-28-68	Opinion per Circuit Judge Burger. Circuit Judge Leventhal concurs in result.
2-28-68	Separate concurring opinion per Circuit Judge McGowan
2-28-68	Judgment affirming judgment of the District Court
3-19-68	Opinion and certified copy of judgment issued to the District Court
5-28-68	Certified record prepared
5-28-68	Letter from counsel designating record for use on certiorari (consent of Mr. Truitt to designation relayed by telephone to Mr. Paulson)
6- 3-68	Notice from Clerk Supreme Court of filing of petition for certiorari on May 28th (SC 1476 OT 67)
7-30-68	Order per Judge Burger amending opinion filed on February 28, 1968
8- 7-68	Receipt dated August 7, 1968 from Clerk, District Court for original record including transcripts and one envelope of exhibit
11-22-68	Certified copy of order from Clerk, Supreme Court, granting petition for certiorari on November 18th (SC 138 OT 68)
12- 2-68	2-Stipulation designating supplemental portions of record for use on certiorari in Supreme Court

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 559-67

ADAM CLAYTON POWELL, JR., 120 West 138th Street, New York, New York

A. PHILIP RANDOLPH, 2588 Seventh Avenue, House No. 7, New York, New York

PERCY E. SUTTON, 311 West 118th Street, New York, New York

BASIL PATTERSON, 400 Manhattan Avenue, New York, New York

J. RAYMOND JONES, 270 Convent Avenue, New York, New York

LILLIAN UPSHUR, 2160 Madison Avenue, New York, New York

HULAN JACK, 45 West 110th Street, New York, New York

GERALDINE L. DANIELS, 28 West 123rd Street, New York, New York

ANTONIO MENDEZ, 1215 Fifth Avenue, New York, New York

HILDA STOKLEY, 58 East 130th Street, New York, New York

MARGARET COX, 626 Riverside Drive, New York, New York

FANNIE ALLISON, 279 Third Avenue, New York, New York

CHARLES B. RANGEL, 74 West 132nd Street, New York, New York

JAMES P. JONES, 239 West 138th Street, New York, New York, Individually, on their own behalf, and on behalf of all others similarly situated, *Plaintiffs*.

v.

JOHN W. MCCORMACK, H-206 United States Capitol, Washington, D.C.

CARL ALBERT, H-150 United States Capitol, Washington, D.C.

GERALD R. FORD, H-230 United States Capitol, Washington, D.C.

EMANUEL CELLER, 2136 Rayburn House Office Building, Washington, D.C.

ARCH A. MOORE, JR., 2440 Rayburn House Office Building, Washington, D.C., Individually, and as members and representatives of the class comprising the House of Representatives of the 90th Congress of the United States; and

JOHN W. McCORMACK, as Speaker of the House of Representatives of the 90th Congress of the United States; and

W. PAT JENNINGS, H-104 United States Capitol, Washington, D.C., Individually, and as Clerk of the House of Representatives of the 90th Congress of the United States; and

LEAKE W. JOHNSON, JR., H-124 United States Capitol, Washington, D.C., Individually, and as Sergeant-at-Arms of the House of Representatives of the 90th Congress of the United States; and

WILLIAM M. MILLER, H-153 United States Capitol, Washington, D.C., Individually, and as Doorkeeper of the House of Representatives of the 90th Congress of the United States, *Defendants*.

COMPLAINT

1. This action arises under Article I, Sections 1, 2(1)(2) (4), 5(1)(2) and 9(3) of the Constitution of the United States and the 5th, 6th, 8th, 9th, 10th, 13th, 15th and 19th Amendments thereto and Title 2, Section 31 et seq. and Title 42, Sections 1971(1)(2), 1981, 1983 of the United States Code. This court has jurisdiction pursuant to Title 28, Sections 1331, 1343(4), 2201, 2202 and 2282 and Title 42, Sections 1971(1)(2), 1981, 1983 of the United States Code and the amount in controversy exclusive of interest and costs exceeds the sum of \$10,000.

2. a. The plaintiffs Adam Clayton Powell, Jr., A. Philip Randolph, Percy E. Sutton, Basil Patterson, J. Raymond Jones, Lillian W. Upshur, Hulan Jack, Geraldine L. Daniels, Antonio Mendez, Hilda Stokley, Margaret Cox, Fannie Allison, Charles B. Rangel and James P. Jones bring this action on their own behalf and on behalf of all other per-

sons similarly situated, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure. Plaintiffs are all non-white citizens of the United States and duly qualified electors of the 18th Congressional District of the state of New York and upon information and belief voted at the general election of 1966 for plaintiff, Adam Clayton Powell, Jr.

b. There are common questions of law and fact, affecting the several rights of these plaintiffs as non-white citizens of the United States, male and female, to vote and to have the duly elected representative of their choice, having met the qualifications prescribed by Article 1, § 2 of the Constitution of the United States, represent them in the House of Representatives of the 90th Congress of the United States.

c. That the claims of the representative parties are typical of the claims of the class.

d. The members of this class are so numerous as to make it impractical to bring them all before this Court in a single proceeding. A common relief is sought and the interest of all the class are adequately represented by plaintiffs.

3. Plaintiff Adam Clayton Powell is the duly elected Representative to the 90th Congress of the United States from the 18th Congressional District of the State of New York and sues herein in that capacity.

4. a. Defendant John W. McCormack is the Speaker of the House of Representatives of the 90th Congress of the United States. As the duly elected Representative from the 9th Congressional District of the Commonwealth of Massachusetts, he is being sued individually and as Speaker of the House of Representatives and as a representative of a class of citizens who are members of the House of Representatives of the 90th Congress.

b. Defendants Carl Albert, Gerald R. Ford, Emanuel Celler, Arch A. Moore, Jr., and Thomas B. Curtis are the duly elected representatives to the House of Representa-

tives of the 90th Congress of the 3rd Congressional District of the State of Oklahoma, of the 5th Congressional District of the State of Michigan, of the 10th Congressional District of the State of New York, of the 1st Congressional District of the State of West Virginia, and of the 2nd Congressional District of the State of Missouri respectively.

c. Defendants described in paragraphs 4a and b are all being sued individually and, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, as representatives of a class of citizens who are presently serving in the 90th Congress as members of the House of Representatives.

d. Defendant W. Pat Jennings is the Clerk of the House of Representatives of the 90th Congress of the United States and is charged with the performance of such duties as are prescribed by law. He is being sued individually and as the Clerk of the House of Representatives.

e. Leake W. Johnson, Jr. is the Sergeant-at-Arms of the House of Representatives of the 90th Congress of the United States. He is charged with performing such duties as are prescribed by law. He is being sued individually and as the Sergeant-at-Arms of the House of Representatives.

f. Defendant William M. Miller is the Doorkeeper of the House of Representatives of the 90th Congress. He is charged with such duties as are prescribed by law. He is being sued individually and as Doorkeeper of the House of Representatives.

5. Plaintiff Adam Clayton Powell, Jr. was duly elected as the Representative from the 18th Congressional District to the 90th Congress of the United States at the general election for such Representatives held on November 8, 1966. Thereafter, he was duly certified by the Secretary of State of the State of New York as being the duly elected Representative from the 18th Congressional District of the State of New York.

6. a. On January 10, 1967 the House of Representatives adopted House Resolution No. 1 which is in part as follows:

That the question of the right of Adam Clayton Powell to be sworn in as a Representative from the State of

New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House to be appointed by the Speaker, four of whom shall be Members of the minority party appointed after consultation with the minority leader. Until such committee shall report upon and the House shall decide such question and right, the said Adam Clayton Powell shall not be sworn in or permitted to occupy a seat in this House.

A copy of aforesaid resolution is set forth in full in Exhibit A to this Complaint (the Hearing before the Select Committee pursuant to House Resolution No. 1) at page 3 thereof.

b. Pursuant to the authority granted by House Resolution No. 1, the defendant John W. McCormack appointed the following Select Committee: Emanuel Celler, Chairman; James C. Corman, Claude Pepper, John Conyers, Jr., Andrew Jacobs, Jr., Arch A. Moore, Jr., Charles M. Teague, Clark MacGregor and Vernon W. Thompson.

c. The Committee met in public session on February 8, 14, 16 and on February 23, 1967 submitted a report to the House of Representatives. This report is attached hereto as Exhibit B to the Complaint and made a part thereof.

7. The Report of the Select Committee found that the plaintiff Adam Clayton Powell, Jr. is over twenty-five years of age, is a citizen of the United States in excess of seven years and is an inhabitant of the State of New York. It concluded that since plaintiff Adam Clayton Powell, Jr. met the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives of the 90th Congress and had been duly certified as the elected Representative from the 18th Congressional District of the State of New York, that he was entitled to be seated and sworn as a member of the House of Representatives of the 90th Congress. The findings and conclusions herein referred to are set forth in the report of the Select Committee, at page 31 et seq., which report is attached hereto as Exhibit B to this complaint.

8. On March 1, 1967 the House of Representatives passed and enacted House Resolution 278 which is as follows:

Whereas,

The Select Committee appointed Pursuant to H. Res. 1 (90th Congress) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964 to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C. or the State of New York as required by law.

Fourth, as Chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member;

Now, therefore, be it

Resolved, That said Adam Clayton Powell, Member-elect from the 18th District of the State of New York,

be and the same hereby is excluded from membership in the 90th Congress and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.

The proceedings of the House on March 1, 1967 which contains the debates on the above resolution are attached hereto as Exhibit C to this complaint.

9. Plaintiffs and class they represent aver that House Resolution No. 278 is null and void and in violation of the Constitution of the United States, in particular Article I, Section 2(2) thereof which sets forth the exclusive qualifications for membership in the House of Representatives. Article I, Section 2(2) provides that a Representative must be twenty-five years of age, seven years a citizen of the United States and an inhabitant of the state from which he was duly elected. These are the sole and only qualifications prescribed by the Constitution for members of the House of Representatives, and they cannot be altered, modified, expanded or changed by the Congress of the United States. The House found that plaintiff Adam Clayton Powell, Jr. possesses the requisite qualifications for membership in the House (House Resolution No. 278 in paragraph 8), but nonetheless voted to exclude him.

10. House Resolution No. 278 is a further nullity in that it violates Article I, Section 1 of the Constitution of the United States which provides that members of the House shall be elected by the people of each state.

11. The refusal of the House to allow plaintiff Adam Clayton Powell to be sworn and seated as a Member thereof despite its own findings and conclusion that he possesses all the requisite constitutional qualifications therefor is a gross violation of the basic rights of the electors of the 18th Congressional District of the State of New York to elect to the House of Representatives a Representative of their choice as long as the person so chosen meets all the qualifications prescribed by the Constitution of the United States.

12. Moreover, the plaintiffs, being non-white citizens of the United States, are being subjected to the pains and penalties of discrimination based upon race and color for-

bidden by the various provisions of the Constitution of the United States, to wit the 5th, 13th and 15 Amendments thereof.

a. In depriving the Negro electors of their choice of Representative to sit in the House of Representatives of the 90th Congress, plaintiffs and all other non-white electors in the aforesaid Congressional District are being subjected to vestiges of slavery and involuntary servitude in violation of the 13th Amendment to the Constitution of the United States.

b. In being deprived of the right to have their chosen Representative sit in the House of Representatives of the 90th Congress, plaintiffs and all other non-white electors of the 18th Congressional District are being deprived of the equal protection of the laws and due process of the law in violation of the mandate of the 5th Amendment to the Constitution of the United States.

c. In being deprived of the right to have the Representative of their choice sit in the House of Representatives of the 90th Congress, plaintiffs and all other non-white electors of the 18th Congressional District are being deprived of the fundamental right to cast a meaningful vote in the general election for representation in the Congress of the United States and are as effectively disenfranchised as non-white citizens of the United States as if House Resolution No. 278 denied them the right to vote expressly on the grounds of race and color—all in violation of the 15th Amendment to the Constitution of the United States.

d. In being deprived of the right to have their chosen Representative sworn and seated as a member of the 90th Congress, plaintiffs Lillian W. Upshur, Geraldine L. Daniels, Hilda Stokley, Margaret Cox, Fannie Allison and all other qualified female electors in the 18th Congressional District of the State of New York are being denied rights guaranteed under the 19th Amendment to the Constitution of the United States.

13. House Resolution No. 278 in effect constitutes a bill of attainder and an ex post facto law as to plaintiff Adam Clayton Powell in violation of Article I, Section 9 of the

Constitution of the United States, in that it imposed punishment upon the named individual by legislative act and created and imposed punitive standards retroactively. In addition, it constitutes cruel and unusual punishment in violation of the 8th Amendment to the Constitution.

14. The hearings before the Select Committee and the Resolution and debate thereon in the House by which plaintiff Adam Clayton Powell was denied the right to sit and all the other electors in the 18th Congressional District of the State of New York were denied the right to elect a Representative of their choice, was a proceeding in which charges were made and punitive action taken without said plaintiff Adam Clayton Powell being accorded, as he demanded, the elemental rights of due process, including but not limited to notice of charges, the right of confrontation of witnesses, effective representation by counsel who could cross-examine witnesses in regard to any matter alleged, all in violation of the 5th and 6th Amendments to the Constitution of the United States despite the fact that timely objectives to this denial of basic rights were made and preserved. In effect, the whole proceeding amounted to a trial for infamous crimes without presentment or indictment by a Grand Jury.

15. Governor Nelson A. Rockefeller of the State of New York has been notified that a vacancy exists in the 18th Congressional District and has announced that an election to fill such vacancy will be held on April 11, 1967. This special election, upon information and belief, will cost the City of New York approximately \$100,000.00. In declaring the seat of the 18th Congressional District of the State of New York vacant and in notifying Governor Rockefeller of said vacancy and in causing the City of New York to undergo the expense of \$100,000.00 to hold a special election, defendant John W. McCormack, acting pursuant to the mandate of the House of Representatives violated the Fifth Amendment to the Constitution in that vacancies in the House of Representatives may occur only pursuant to the manner and method prescribed in the Constitution and laws of the United States—withdrawal, resignation, expulsion or impeachment (Article I, Section 2(4)(5), Section 3(6)(7))

and Section 5(2) and Title 2, Section 8 of the United States Code.

16. The defendant John W. McCormack, as Speaker of the House of Representatives, has refused and threatens to continue to refuse to administer the oath of office as a member of the House to the plaintiff Adam Clayton Powell under color and authority of his office and the illegal and unconstitutional actions of the House of Representatives in adopting House Resolutions No. 1 and 278.

17. The defendant John W. McCormack further threatens to exclude the plaintiff Adam Clayton Powell from the occupancy of his office in the House Office Building and to deprive him of all of the emoluments and privileges of office to which he is entitled as a Representative to the 90th Congress of the 18th District in clear violation of his authority as Speaker of the House, and the authority of the House of Representatives itself under the Constitution of the United States, namely Article I, Sections 1, 2 and 5 and the 5th Amendment to the Constitution of the United States.

18. a. The defendant W. Pat Jennings, the Clerk of the House, threatens to refuse to perform for the plaintiff those services and duties to which he is entitled as the duly elected Representative of the 18th Congressional District under color of the authority and mandate of House Resolution No. 278 and in violation of the Constitution and laws of the United States.

b. Defendant Leake W. Johnson, as Sergeant-at-Arms of the House, refuses and threatens to continue to refuse to pay over to plaintiff Adam Clayton Powell, Jr. the salary and other monies due him as the duly elected Representative of the 18th Congressional District of the State of New York under color of the authority of House Resolution No. 278 and in violation of the Constitution and laws of the United States.

c. Defendant William M. Miller, Doorkeeper of the House, refuses and threatens to continue to refuse to admit Adam Clayton Powell to the Hall of the House as the duly elected Representative of the 18th Congressional District of the

State of New York under color of the authority and mandate of House Resolution No. 278 and in violation of the Constitution and laws of the United States.

19. Plaintiffs aver that this is a proceeding to restrain the enforcement, operation or execution of House Resolution No. 278 on the ground that such Resolution is unconstitutional on its face in that it is in clear violation of Article I, Section 2(2) and is unconstitutional as applied to these plaintiffs and the class they represent in that it violates not only Article I, Section 2, but Article I, Section 1, 5 and 9 as well, and the 5th, 6th, 8th, 9th, 10th, 13th, 15th and 19th Amendments to the Constitution of the United States.

20. Plaintiffs further aver that this is a proceeding wherein they seek a declaration of their rights under Title 28, Sections 2201 and 2202 of the United States Code, in that the defendants, their officers, agents, servants, employees, attorneys and those persons acting in concert with them or participating with them by refusing to seat Adam Clayton Powell, Jr. as a Member of the House of Representatives of the 90th Congress, to have the oath administered to him and to be allowed to participate in the proceedings of the House on the same terms and conditions as all other members are violating Article I, Sections 1, 2 (1)(2)(4) and 9(3) of the Constitution and the 5th, 6th, 8th, 9th, 10th, 13th, 15th and 19th Amendments thereto and are denying to him and to the electors of the 18th Congressional District due process of law and the equal protection of the laws as guaranteed by the Fifth Amendment to the Constitution of the United States.

21. Unless this Court restrains the enforcement of this illegal, unconstitutional, null and void House Resolution No. 278 and all acts taken thereunder, the plaintiff Adam Clayton Powell and the non-white electors of the 18th Congressional District of the State of New York will suffer serious, immediate and irreparable injury in that the plaintiff Adam Clayton Powell will be deprived of all rights, privileges and emoluments to which he is entitled under the Constitution and laws of the United States and rules and precedents of the House as a Representative of the 90th

Congress of the United States; the plaintiff non-white electors and all other electors of the 18th Congressional District will be deprived of their fundamental right to be represented in the House of Representatives by their duly chosen Representative who has met all the requisite constitutional qualifications therefor. The 18th Congressional District is overwhelmingly composed of non-white electors and is the only such district that has elected the same Congressman to the House of Representatives for a period of twenty-two years. In so doing, these electors have attained through their chosen Representative, Adam Clayton Powell, Jr., privileges, authority and status pursuant to the rules and precedents of the House. This is an interest and investment which they are now threatened with being deprived of by virtue of House Resolution 278 and the unlawful and unconstitutional action taken in reliance thereon.

22. There is between the parties an actual controversy as herein set forth. The plaintiffs and all other electors similarly situated and affected in the 18th Congressional District of the State of New York on whose behalf this suit is brought are suffering irreparable injury as aforesaid and are threatened with irreparable injury in the future by reason of the actions herein complained of. They have no plain, adequate or complete remedy to redress the wrong and unlawful actions herein complained of. Any other remedy to which these plaintiffs and the class they represent could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve multiplicity of suits, cause further irreparable injury, damage and inconvenience to the plaintiffs and the class whose interest is herein asserted.

WHEREFORE, the premises considered, plaintiffs pray:

1. That this Court take jurisdiction of this case and certify the necessity for convening a statutory three-judge District Court, and that such Court be duly and speedily convened to hear and determine this case as provided by law pursuant to Title 28 of the United States Code, Sections 2282 and 2284;

2. that after such hearing, it issue a permanent injunction restraining the defendants, their agents, servants,

officers and employees or attorneys and all other persons, in active concert or participation with them from enforcing, operating under or in any manner whatsoever executing House Resolution 278;

3. that it issue a permanent injunction restraining the defendant John W. McCormack, as Speaker of the House, from refusing to administer the oath of office as a member of the 90th Congress to plaintiff Adam Clayton Powell, Jr.; defendant W. Pat Jennings, Clerk of the House, from refusing to perform for plaintiff Adam Clayton Powell, Jr., such services and duties as he is required as Clerk to perform for members of the House of Representatives; defendant Leake W. Johnson, Sergeant-at-Arms, from refusing to pay Adam Clayton Powell all salaries and moneys due him by law as a Representative of the 90th Congress; defendant William M. Miller, Doorkeeper, from refusing to admit him to the Hall of the House, and restraining defendants John W. McCormack and W. Pat Jennings from excluding plaintiff Adam Clayton Powell from his office in the House Office Building and from denying to him any of the rights, privileges and emoluments to which he is entitled as a Representative of the 90th Congress; and restraining defendants John W. McCormack, Carl Albert, Gerald R. Ford, Emanuel Celler, Arch A. Moore, Jr., and Thomas B. Curtis and all other members of the class of citizens they represent who are members of the House of Representatives from taking any action to enforce House Resolution No. 278 or any other action which will deny to plaintiff Adam Clayton Powell, Jr., the right to be seated as the duly elected Representative of the 18th Congressional District to the 90th Congress.

Plaintiffs further pray that relief in the nature of mandamus be granted, pursuant to Title 28, Section 1361, United States Code, ordering and directing John W. McCormack, Speaker of the House of Representatives of the Ninetieth Congress of the United States to administer the oath of office to plaintiff Adam Clayton Powell, Jr., as the duly elected and qualified Representative from the 18th Congressional District of the State of New York to the 90th Congress of the United States; and that similar relief be

granted ordering and directing W. Pat Jennings, as Clerk, and Leake W. Johnson, Jr., as Sergeant-at-Arms, respectively, of the House of Representatives of the 90th Congress of the United States to pay over to Adam Clayton Powell, Jr. all money, salary, and allowances and accord him all rights, privileges and emoluments due to him as the duly elected and qualified Representative from the 18th Congressional District of the State of New York.

Plaintiffs further pray that pending final hearing and determination as to their right to permanent relief:

1. A preliminary injunction be issued restraining the defendants, their agents, servants, officers and employees or attorneys and all other persons in active concert or participation with them from enforcing, operating under or in any manner whatsoever executing House Resolution No. 278;

2. that a preliminary injunction be issued restraining the defendant John W. McCormack, as Speaker of the House, from refusing to administer the oath of office as a member of the 90th Congress to plaintiff Adam Clayton Powell, Jr.; defendant W. Pat Jennings, Clerk of the House, from refusing to perform for plaintiff, Adam Clayton Powell, Jr.; such services and duties as he is required as Clerk to perform for members of the House of Representatives; defendant Leake W. Johnson, Sergeant-at-Arms, from refusing to pay Adam Clayton Powell all salaries and moneys due him by law as a Representative of the 90th Congress; defendant William M. Miller, Doorkeeper, from refusing to admit him to the Hall of the House; and restraining defendants John W. McCormack and W. Pat Jennings from excluding plaintiff Adam Clayton Powell from his office in the House Office Building and from denying to him any of the rights, privileges and emoluments to which he is entitled as a Representative of the 90th Congress; and restraining defendants John W. McCormack, Carl Albert, Gerald R. Ford, Emanuel Celler, Arch A. Moore, Jr., and Thomas B. Curtis and all other members of the House of Representatives from taking any action to enforce House Resolution No. 278, or any other action which will deny to plaintiff Adam Clayton Powell, Jr., the right to be seated

as the duly elected Representative of the 18th Congressional District to the 90th Congress.

Plaintiffs further pray that the court advance this case on the docket and order a speedy hearing thereon, adjudge, decree, and declare the rights and legal relations of the parties hereto in order that such declaration shall have the force and effect of a final judgment or decree; and plaintiffs further pray that the court enter a judgment or decree declaring the practice, policy, custom or usage of the defendants, their agents, servants, officers, employers or attorneys and those persons in active concert or participation with them of excluding plaintiff Adam Clayton Powell from the House of Representatives of the 90th Congress as a member thereof and in denying to him any and all rights and privileges pertaining thereto to be a violation of the laws and Constitution of the United States.

Plaintiffs further pray that this Court adjudge and decree House Resolution No. 278 null and void on the grounds that its operation, enforcement and execution is unconstitutional on its face in that it is in violation of Article I, Section 2(2) of the Constitution of the United States and that this aforesaid House Resolution No. 278 is unconstitutional in its application to plaintiffs and the class they represent in that it violates Article I, Sections 1, 5, and 9 of the Constitution of the United States and the 5th, 6th, 8th, 10th, 13th, 15th, and 19th Amendments thereto.

Finally, plaintiffs pray for such other and further relief as to the Court may seem just and proper.

Adam Clayton Powell, Jr., A. Philip Randolph, Percy E. Sutton, Basil Patterson, J. Raymond Jones, Lillian W. Upshur, Hulan Jack, Geraldine L. Daniels, Antonio Mendez, Hilda Stokley, Margaret Cox, Fannie Allison, Charles B. Rangel and James P. Jones, Individually and on behalf of all other persons similarly situated.

Lillian W. Upshur.
Plaintiffs.

STATE OF NEW YORK,
County of New York ss.:

Lillian W. Upshur, being first duly sworn according to law, deposes and says: that she has read and understands

the foregoing complaint by her subscribed in behalf of herself, the other named plaintiffs, and other persons similarly situated, and that the matters and things alleged therein she verily believes to be true.

LILLIAN W. UPSHUR.

Subscribed and sworn to before me this 7th day of March, 1967.

STEVEN J. illegible,
Notary Public.

My commission expires March 30, 1968.

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Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 559-'67

ADAM CLAYTON POWELL, JR., et al., *Plaintiffs*,

v.

JOHN W. MCCORMACK, et al., *Defendants*.

APPLICATION FOR CONVENING OF THREE-JUDGE DISTRICT COURT

Plaintiffs, upon their complaint heretofore filed, hereby make application for hearing of this cause and of the plaintiffs' motion for an interlocutory injunction herein before a three-judge district court as required by Section 2282, Title 28, United States Code, and request that the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit be notified pursuant to Section 2284, Title 28, United States Code, of presentation of plaintiffs' application for injunction in order that necessary designation of judges for said court may be made.

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IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 559-'67

ADAM CLAYTON POWELL, JR., et al., *Plaintiffs*,

v.

JOHN W. MCCORMACK, et al., *Defendants*.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
'PLAINTIFFS' APPLICATION FOR THE CONVENING OF A STATU-
TORY THREE-JUDGE COURT PURSUANT TO 28 U.S.C. SECTIONS
2282 and 2284.

In ascertaining whether the statutory three-judge court jurisdiction has been properly invoked, the United States Supreme Court, in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962), placed the scope of the inquiry in these words:

... When an application for a statutory three-judge court is addressed to a District Court, the court's inquiry is properly limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes under the requirements of the three-judge statute.

In *Schneider v. Rusk*, 372 U.S. 224, 225 (1963) the Court stated that:

... the constitutional questions involving deprivation of nationality which were presented to the district judge were not plainly insubstantial. The single-judge District Court was therefore powerless to dismiss the action on the merits, and should have convened a three-judge court. *Ex parte Northern Pac. R. Co.*, 280 U.S.

142, 144, 50 S. Ct. 70, 74 L. Ed. 233; *Stratton v. St. Louis S. W. R. Co.*, 282 U.S. 10, 15, 51 S. Ct. 8, 10, 75 L. Ed. 135; *Ex parte Poresky*, 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152; *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 82 S. Ct. 1294, 8 L. Ed. 794.¹

In this Circuit, the standards for convening a statutory three-judge court have been definitively stated in *Reed Enterprise v. Corcoran*, 354 F. 2d 519, 521 where Circuit Judge J. Skelly Wright framed the issues as follows:

The problem presented as to whether the convening of three-judge Districts Courts is required in these cases divides itself into three parts: (1) the presence or absence of a substantial constitutional question; (2) the necessity for injunctive relief; and (3) the presence or absence of a case or controversy. We shall consider these issues serialim.

1. "*The presence or absence of a substantial constitutional question*"

It can hardly be argued that the question as to whether the House of Representatives, in refusing to seat a member-elect, has exceeded its powers under the Constitution of the United States—particularly under Article I, Section, Clause 2 and Section 5, Clause 2—is not a "substantial constitutional question." It is plaintiffs' contention that the House of Representatives is constitutionally required to seat a duly elected Congressman who meets all of the qualifications required for membership therein as set forth in Article I, Section 2, Clause 2, which reads as follows:

No person shall be a Representative who shall not have attained to the age of 25 years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen.

¹ See also *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Powell v. Workmen's Compensation Board of New York*, 327 F. 2d 131, 138 (1964); *Keyishian v. Board of Regents*, 345 F. 2d 236, 239 (1965); rev'd on these grounds — U.S. —

The history of the proceedings at the Constitutional Convention, during which these qualifications were accepted and all others rejected, reveals the clear intention of the framers that the legislature was to have no power to alter or add to the constitutional qualifications and that accordingly the power of each House to be a "judge of the . . . qualifications of its own members" (Article I, Section 5) was, by the Constitution itself, restricted to the qualifications of age, citizenship and inhabitancy set forth in Article I, Section 2, Clause 2, *supra*. In this connection the Court's attention is respectfully referred to Warren, *The Making of Our Constitution* (1928), pp. 420-24; 2 Farrand, *Records of the Federal Convention*, p. 248 et seq; *The Federalist Papers*, No. 68. See also Storey, *Commentaries of the Constitution* (5th ed.), p. 460; Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America*, p. 27 (1866); McCrary, *Elections* (3rd ed.), p. 214 and p. 387; 33 Va. L.R. 322, 334 (1947); Cooley, *Constitutional Limitations*; Tucker, *Treatise on the Constitution*, p. 394; Foster, *Treatise on the Constitution*, p. 367; Paschal, *Annotated Constitution*, 2d Ed., p. 305 § 300; Willoughby, *Constitutional Law of the United States*, 2d ed. § 337; Meecham, *Public Offices*, 164 (1890); Throop, *Public Offices*, § 73.

Only this Term the Supreme Court of the United States in *Pond v. Floyd*, 87 S. Ct. 339 (1966), in a unanimous opinion, reminded us that it was the clear intention of the framers that Congress was to have no power to alter, change or add to the constitutional qualifications for membership in either House. In so doing, it ordered seated in the Georgia House of Representatives a member-elect who possessed all of the constitutional qualifications but had been barred for reasons other than those constitutionally prescribed.

In the course of its unanimous opinion, the Court, speaking through the Chief Justice, reiterated the fundamental constitutional mandate of the framers that the national legislature as well had no power to refuse to seat a member-elect who met the constitutional qualifications. At page 340, in footnote 13, the Court analyzed the intentions of the framers:

Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views. At the Constitutional Convention of 1787, Madison opposed a proposal to give to Congress power to establish qualifications in general. Warren, *The Making of the Constitution* (1928), 420-422. The Journal of the Federal Convention of 1787 states:

"Mr. Madison was opposed to the Section as vesting an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the constitution. * * * Qualifications founded on artificial distinction may be devised, by the stronger in order to keep out partizans of a weaker faction.

.

"Mr. Madison observed that the British Parliament possessed the power of regulating the qualifications both of the electors and the elected: and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties. 2 Farrand, *The Records in the Federal Convention of 1787* (Aug. 10, 1787), pp. 249-250.

"Hamilton agreed with Madison that:

"The qualifications of the persons who may choose or be chosen * * * are defined and fixed by the constitution: and are unalterable by the legislature." The Federalist, No. 60 (Cooke ed. 1961), 409."

Certainly, the complaint in the instant case which raises this constitutional issue is not "patently frivolous." *Reed Enterprises v. Corcoran* and *Idlewild Bon Voyage Liquor Corp. v. Epstein*, *supra*. In this connection see *Krebs v.*

Ashbrook, (D.C. D.C.) Civil Action No. 2157-1966, *Hobson v. Hansen* (D.C. D.C.) Civil Action No. 82-66, 252 F. Supp. 4(1966), and *DuBois Clubs of America v. Katzenbach* (D.C. D.C.) Civil Action No. 1087-66, all cases pending in this District in which statutory three-judge courts were convened.

2. "The necessity for injunctive relief"

It is equally obvious that the complaint, in the words of the Court in *Idlewild*, "at least formally allege[s] a basis for equitable relief." The allegations conform to the requirements of *Ex parte Young*, 209, U.S. 123, which underline the power of federal courts to enjoin the enforcement of unconstitutional statutes. "The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507(1959). The power of a Federal District Court to entertain a cause of action seeking injunctive relief from the threatened enforcement of unconstitutional statutes is not open to question. *Ex parte Young*, supra; *Truax v. Reich*, 239 U.S. 33; *Terrace v. Thompson*, 263 U.S. 197; *Hague v. CIO*, 307 U.S. 496; *American Federation of Labor v. Watson*, 327 U.S. 582; *Pierce v. Society of Sisters*, 268 U.S. 510; and *Hale v. Bimco Trading Co.*, 306 U.S. 375.

3. "The presence or absence of a case or controversy"

The power of federal courts to restrain acts of Congress has been unquestioned since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Ever since *Marbury*, the judicial branch has asserted the right and duty to exercise the power of judicial review over acts of Congress claimed to be violative of the Constitution in cases properly brought before them. In Marshall's words, as applicable now as then:

It is emphatically the province and duty of the judicial department to say what the law is . . .

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case

... the Court must determine which of these conflicting rules governs the case. This is of the very essence of the judicial duty.

There can be no question that plaintiffs expressly state a cause of action arising under the Constitution and laws of the United States as required by 28 U.S.C. 41(1) and, in particular, under Article I, Section 1, 2(1)(2) (4), 51(1)(2) and 9(3) of the Constitution of the United States and the 5th, 6th, 8th, 9th, 10th, 13th, 15th and 19th Amendments.

In *Bell v. Hood*, 327 U.S. 678, 683 (1946) the Supreme Court, in reversing a dismissal of an action for damages based on violations of the 4th and 5th Amendments, held that where "the alleged violations of the Constitution ... are not immaterial but form rather the sole basis of the relief sought," the matter in controversy "arises under the Constitution or laws of the United States, whether these are suits in 'equity' or at 'law' ". As Mr. Justice Black stated, "... where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (at 684)

Conclusion

As demonstrated above, the complaint contains "a substantial constitutional question" which is not "patently frivolous"; at least formally alleges a basis for equitable relief; and sets forth a justiciable case or controversy. All the necessary prerequisites for the invocation of the statutory court jurisdiction set forth in *Idlewild* and *Reed*, supra, have been complied with. The three-judge court should be immediately convened in order to bring before it promptly this case of high constitutional order.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 559-'67

ADAM CLAYTON POWELL, et al., *Plaintiffs*,

v.

JOHN W. MCCORMACK, et al., *Defendants*.

MOTION FOR PRELIMINARY INJUNCTION (THREE-JUDGE COURT)

Upon the verified complaint of Adam Clayton Powell, Jr., et al., annexed hereto, the plaintiffs move the court as follows:

1. To issue a temporary injunction suspending and restraining the operation, enforcement, or execution of that portion of United States House of Representatives Resolution No. 278, Ninetieth Congress, enacted March 1, 1967, which is specified in Paragraph 5 of the Complaint in the above-entitled action, pending the final hearing and determination of this cause.

2. To convene for the purpose of hearing and determining this application for a preliminary injunction and this cause, a statutory court of three judges at least one of whom shall be circuit judge, in accordance with the provisions of Section 2284, Title 28, United States Code.

The grounds of this motion, as more fully set forth in the verified complaint are that:

a. The portions of the said House Resolution No. 278 complained of are invalid.

b. The United States House of Representatives, Ninetieth Congress, unless enjoined, threaten to enforce said House Resolution.

c. The said House Resolution and its enforcement are causing and will cause immediate and irreparable injury to the plaintiffs.

d. Unless the operation and enforcement of the said House Resolution be restrained pending final disposition of the action, the injury to plaintiffs in the interim will be irreparable even by final judgment for plaintiffs.

e. No injury will be sustained by the defendants or by the public through issuance of a temporary injunction.

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Filed Mar. 10, 1967. Robert M. Stearns, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 559-'67

ADAM CLAYTON POWELL, JR., et al., *Plaintiffs*,

v.

JOHN W. MCCORMACK, et al., *Defendants*.

ORDER FOR CORRECTION OF COMPLAINT

Upon consideration of the oral motion by counsel for plaintiffs in open court, it appearing to the Court that, although Thomas B. Curtis is named and described as a defendant in Paragraph 4b of the Complaint, his name inadvertently was omitted from the caption thereof, and it further appearing that Zeake W. Johnson, Jr., sergeant-at-arms of the House of Representatives of the Ninetieth Congress, of the United States inadvertently and erroneously is described in the Complaint and caption thereof as "Leake W. Johnson, Jr.," and it further appearing that no responsive pleading has been filed, it is by the Court this 10th day of March, 1967.

Ordered, that the caption of the Complaint herein be corrected and amended to include Thomas B. Curtis as a defendant and that service of process be made upon said defendant; and

It Is Further Ordered, that the name "Leake W. Johnson, Jr.," be corrected to read "Zeake W. Johnson, Jr." in the caption and in Paragraphs 4e., and 18b., and in the prayers for relief in the Complaint.

Name illegible.

District Judge.

Filed 3/31/67

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil Action No. 559-67

ADAM CLAYTON POWELL, JR., et al., *Plaintiffs*,

v.

JOHN W. MCCORMACK, et al., *Defendants*.

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure defendants, by counsel appearing specially to contest the jurisdiction of this Court and to assert the privileges of the House of Representatives of the United States, move to dismiss the complaint for the reasons that:

1. This Court does not have jurisdiction over the subject matter of this action;
2. This Court does not have jurisdiction over the persons of the defendants;
3. The complaint fails to state a claim upon which relief may be granted.

BRUCE BROMLEY

1 Chase Manhattan Plaza
New York, New York
422-3000

*Attorney for Defendants
Appearing Specially*

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of March, 1967 served the foregoing Motion to Dismiss together with a Memorandum of Points and Authorities in Support of the Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction by delivering a copy of each personally to Frank D. Reeves, Esq., Howard University, Washington, D. C., counsel for plaintiffs.

s/LOUIS F. OBERDORFER.

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Civil Action No. 559-67

ADAM CLAYTON POWELL, JR., et al., *Plaintiffs*,

v.

JOHN W. McCORMACK, et al., *Defendants*.

ORDER

Upon consideration of the complaint filed herein, of the motions filed herein and the points and authorities in support of and in opposition to the same, and oral argument having been had in open court, it is by the Court this 7th day of April, 1967,

ORDERED, That the application for a three-judge Court be and the same is hereby denied, and it is further

ORDERED, That the complaint be and the same is hereby dismissed for want of jurisdiction of the subject matter, and it is further

ORDERED, That the motion for a preliminary injunction be and the same is hereby denied.

Name illegible.

Judge.

Filed Apr. 7, 1967. Robert M. Stearns, Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 559-67

ADAM CLAYTON POWELL, JR., et al., *Plaintiffs*,

v.

JOHN W. MCCORMACK, et al., *Defendants*.

NOTICE OF APPEAL

Notice is hereby given this 7th day of April, 1967, that Adam Clayton Powell, Jr., A. Philip Randolph, Percy E. Sutton, Basil Patterson, J. Raymond Jones, Lillian Upshur, Hulan Jack, Geraldine L. Daniels, Antonio Mendez, Hilda Stokley, Margaret Cox, Fannie Allison, Charles B. Rangel and James P. Jones hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 7th day of April, 1967 in favor of John W. McCormack, Carl Albert, Gerald R. Ford, Emanuel Celler, Arch A. Moore, Jr., W. Pat Jennings, Leake W. Johnson, Jr. and William H. Miller against said plaintiffs.

FRANK D. REEVES
Attorney for Plaintiffs
P.O. Box 1121
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797-1582

Filed Apr. 10, 1967. Nathan J. Paulson, Clerk

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 20897

September Term, 1966

Civil Action No. 559-67

ADAM CLAYTON POWELL, JR., et al., *Appellants*,

v.

JOHN W. MCCORMACK, JR., et al., *Appellees*.

Before: BASTIAN, Senior Circuit Judge, and, TAMM and
LEVENTHAL, Circuit Judges, in Chambers.

ORDER

On consideration of appellants' motion for summary reversal of order and judgment of the United States District Court for the District of Columbia, to waive printing of the record and the filing of briefs, for leave to proceed on the original record, and for an immediate hearing, it is

ORDERED by the court that appellants' request for immediate hearing be denied, and responsive pleadings shall be filed by the parties in accordance with the provisions of Rule 31 of the General Rules of this Court.

Per Curiam.

Filed May 10, 1967. Nathan J. Paulson, Clerk

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 20897

September Term, 1966

Civil Action No. 559-67

ADAM CLAYTON POWELL, JR., et al., *Appellants*,

v.

JOHN W. McCORMACK, Speaker of the House of
Representatives, et al., *Appellees*.

Before: BAZELON, Chief Judge; and BURGER and LEVENTHAL,
Circuit Judges, in Chambers.

ORDER

On April 27, 1967, this court entered an order denying appellants' motion for summary reversal of the order and judgment of the District Court. Appellants' counsel having represented to the court that prompt resolution of the issues on appeal herein was imperative, and having requested expedited consideration on the merits in the event their motion for summary reversal was denied, and the court being of the view that novel issues of substantial public importance were tendered which, while requiring the assistance of full briefs, should be resolved at an early date, the court waived the provisions of its General Rules so as to allow this appeal to be heard on the original record and with mimeographed or xeroxed briefs. In a further effort to accommodate appellants' request for expedition, and in light of appellees' willingness to cooperate in this regard as reflected in the representations of counsel during oral argument, the court directed counsel to confer with the Clerk in an effort to establish a mutually agreeable briefing schedule and authorized the clerk to establish such a schedule allowing the parties such time as was reasonably necessary properly to brief the issues on appeal herein. The court also directed the Clerk to set this case for oral argument on a day as soon

after the briefs of the parties were filed as the business of the court would permit.

Subsequent to the entry of the court's order of April 27, 1967, appellees' counsel conferred with the Clerk, agreed to attend the conference contemplated by the court's order forthwith, and expressed their continued willingness to file their brief within fifteen days after appellants' brief was filed. On May 4, 1967, appellants filed a motion with respect to the court's order of April 27, 1967, representing that a petition for writ of certiorari is being prepared and will be filed with the Supreme Court of the United States, and requesting a stay of all further procedural steps in this court pending consideration and disposition of that petition by the Supreme Court. Appellees have submitted a response to that motion wherein they urge the establishment of a new expedited briefing schedule to take effect in the event the Supreme Court denies appellants' petition for writ of certiorari.

Now, upon consideration of the foregoing, it is

ORDERED by the court that the provisions of this court's order entered April 27, 1967, which waived provisions of this court's General Rules and established procedures whereby this appeal would be expedited shall be deemed to have lapsed; and it is

FURTHER ORDERED that the time for filing appellants' brief, which expires on May 17, 1967, is extended for a period of forty days from the date of this order provided that appellants shall in any event be entitled to fifteen days from the date of the Supreme Court's disposition of their petition for certiorari, and it is

FURTHER ORDERED that appellees' brief and appellants' reply brief, if any, shall be filed within the time permitted by Rule 18 of the General Rules of this Court; and it is

FURTHER ORDERED that this order shall be stayed forthwith if the Supreme Court grants appellants' petition for certiorari; and it is

FURTHER ORDERED that, except to the extent hereinabove set forth, appellants' motion to stay proceedings is denied without prejudice to the filing of a motion for advancement of oral argument after their brief is filed.

Nothing herein shall be construed to prevent either party from seeking further relief by appropriate motion for good and sufficient cause shown.

Per Curiam.

Filed June 27, 1967. Nathan J. Paulson, Clerk

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 20897

September Term, 1966

Civil Action No. 559-67

ADAM CLAYTON POWELL, JR., et al., *Appellants*,

v.

JOHN W. MCCORMACK, Speaker of the House of
Representatives, et al., *Appellees*.

Before: BAZELON, Chief Judge, in Chambers.

ORDER

On consideration of appellants' unopposed motion to extend the time for filing appellants' brief and for leave to file a brief in excess of 50 pages, it is

ORDERED that appellants' time for filing their brief is extended to and including July 5, 1967. Appellants' brief is not to exceed 75 pages.

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 20,897

ADAM CLAYTON POWELL, JR., et al., *Appellants*

v.

JOHN W. MCCORMACK,
Speaker of the House of Representatives, et al., *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided February 28, 1968

Mr. Arthur Kinoy, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, *Messrs. Frank D. Reeves* and *Herbert O. Reid, Sr.*, with whom *Mr. William M. Kunstler* and *Mrs. Jean Camper Cahn*, were on the brief, for appellants.

Mr. Bruce Bromley, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Lloyd N. Cutler, John H. Pickering, Louis F. Oberdorfer, Max O. Truitt, Jr.*, and *Timothy B. Dyk*, were on the brief, for appellees.

Before BURGER, MCGOWAN and LEVENTHAL, *Circuit Judges*.

BURGER, *Circuit Judge*: This case presents for the first time the question of whether courts can consider claims that a Member-elect has been improperly excluded from his seat in the United States House of Representatives. On the basis of findings by that body that Member-elect Adam Clayton Powell, Jr., had been guilty of misconduct as a Member of a prior Congress and of contumacious conduct toward the courts of the State of New York, the House voted to exclude him from the seat in the 90th Congress to which he had been elected in 1966 by the voters of the 18th Congressional District of New York.¹

¹ Mr. Powell was thereafter re-elected to the Congress in the special election called to fill the vacancy determined to exist by reason of his exclusion. He has not since presented himself to take the oath.

This suit was brought by Mr. Powell and thirteen voters² of the 18th Congressional District of New York in the United States District Court for the District of Columbia. Appellants sought injunctive relief, mandamus, and a declaratory judgment against Appellees who are Members and officials of the House of Representatives of the 90th Congress. Appellees were sued individually, in their official positions, and as representatives of all Members of the House of Representatives.³ The complaint was accompanied by a motion to convene a statutory three-judge court. The District Court dismissed Appellants' complaint for want of subject matter jurisdiction, *Powell v. McCormack*, 266 F. Supp. 354 (D. D.C. 1967).

While Appellants' claims actually arose as a result of action taken by the House at the time of the organization of the 90th Congress, the factual genesis of that action derived from events involving the alleged conduct of Member-elect Powell during earlier Congresses. The underlying events were summarized in a House Report as follows:

During the 89th Congress open and widespread criticism developed with respect to the conduct of Representative Adam Clayton Powell, of New York. This criticism emanated both from within the House of Representatives and the public, and related primarily to Representative Powell's alleged contumacious conduct toward the courts of the State of New York and his alleged official misconduct in the management of his congressional office and his office as chairman of the Committee on Education and Labor. There were charges Representative Powell was misusing travel funds and was continuing to employ his wife on his clerk-hire payroll while she was living in San Juan, P.R., in violation of Public Law 89-90, and apparently performing few if any official duties.

In September 1966, as the result of protests made

² Appellants are Adam Clayton Powell, Jr., A. Philip Randolph, Percy E. Sutton, Basil Patterson, J. Raymond Jones, Lillian Upshur, Hulan Jack, Geraldine L. Daniels, Antonio Mendez, Hilda Stokley, Margaret Cox, Fannie Allison, Charles B. Rangel, and James P. Jones.

³ See p. 13 *infra*.

by a group of Representatives serving on the Committee on Education and Labor, the Committee on House Administration, acting through its chairman, issued instructions for the cancellation of all airline credit cards which had been issued to the Committee on Education and Labor and notified Chairman Powell that all future travel must be specifically approved by the Committee on House Administration prior to undertaking the travel.

The Special Subcommittee on Contracts of the Committee on House Administration, under the chairmanship of Representative Hays of Ohio, conducted an investigation into certain expenditures of the Committee on Education and Labor, which focused primarily on the travel expenses of Chairman Powell and of the committee's staff during the 89th Congress, and the clerk-hire status of Y. Marjorie Flores. Hearings were held on December 19, 20, 21 and 30, 1966, and a report (H. Res. [sic] 2349) was filed just prior to the end of the 89th Congress. . . . Subsequent to the report of the Hays subcommittee and prior to the organization of the 90th Congress, the Democrat Members-elect, meeting in caucus, voted to remove Representative-elect Powell from his office as chairman of the Committee on Education and Labor.⁴

The 90th Congress met to organize on January 10, 1967. At that time Member-elect Van Deerlin, of California, objected to the administration of the oath to Member-elect Powell.⁵ Upon request, Member-elect Powell stepped aside while the oath was administered to the other Members-elect. Shortly thereafter Representative Udall, of Arizona, introduced a resolution that the oath be administered to Member-

⁴ H.R. REP. NO. 27, 90th Cong., 1st Sess. 1-2 (1967) (footnote omitted). The earlier report concluded that Representative Powell and certain staff employees deceived the approving authorities as to travel expenses and that the record raised a strong presumption that the payment of funds to Mr. Powell's wife violated existing law. H.R. REP. NO. 2349, 89th Cong., 2d Sess. 6-7 (1966).

⁵ 113 Cong. Rec. H 4 (daily ed. Jan. 10, 1967). The proceedings on January 10, 1967, in the House are found in *id.* at H 4-16.

elect Powell and that the question of his final right to be seated as a Member of the 90th Congress be referred to a select committee. The debate on this resolution centered on whether to seat Member-elect Powell or to delay his seating pending a committee investigation. Before a vote was taken, Member-elect Powell was permitted to make a statement to the House. The Udall resolution was replaced by a substitute resolution offered by Representative Ford, of Michigan, which was then adopted as House Resolution 1, 90th Congress, 1st Session.⁶

House Resolution 1 referred to a Select Committee the question of whether or not Mr. Powell should be seated. This Select Committee was to be comprised of nine members selected by The Speaker, four of whom would be members of the minority party, designated by the Minority Leader. The Select Committee was authorized to hold hearings and compel the attendance of witnesses and the production of documents by subpoena. House Resolution 1 prohibited Mr. Powell from being sworn in or seated until the House acted on the Committee report. Mr. Powell, however, was permitted to receive the pay, allowances, and emoluments of a Member during the course of the investigation. The Select Committee was to report to the House within five weeks after its members were appointed.

On January 19, 1967, The Speaker appointed nine lawyer-Members to the bipartisan Select Committee.⁷ The Select Committee wrote Mr. Powell on February 1, 1967, inviting him to testify and respond to interrogation before the Committee on February 8, 1967. The stated scope of the testimony and interrogation was to include Mr. Powell's

qualifications of age, citizenship and inhabitancy, and the following other matters:

⁶ The roll call vote to bring the Udall resolution to a vote was 126 yeas, 305 nays. *Id.* at H 13-14. After the Ford substitution was agreed upon, the amended resolution was approved by a roll call vote of 364 to 64. *Id.* at H 16.

⁷ The Select Committee members were Emanuel Celler (N.Y.) (Chairman), James C. Corman (Calif.), Claude Pepper (Fla.), John Conyers, Jr. (Mich.), Andrew Jacobs, Jr. (Ind.), Arch A. Moore, Jr. (W.Va.), Charles M. Teague (Calif.), Clark MacGregor (Minn.), and Vernon W. Thomson (Wis.).

(1) The status of legal proceedings to which [Mr. Powell was] a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which [he had] been held in contempt of court;

(2) Matters of [Mr. Powell's] alleged official misconduct since January 3, 1961.⁸

The letter further advised Mr. Powell that he could be accompanied by counsel and that the hearings would be conducted in accordance with House Rule XI, paragraph 26.⁹

Mr. Powell appeared at the February 8 hearing, accompanied by his attorneys. At this time the Chairman, Mr. Celler, without objection from Mr. Powell, took official notice of the published hearings and conclusions of the Special Subcommittee on Contracts of the Committee on House Administration, relating to the investigation of Mr. Powell conducted during the 89th Congress. *See* note 4 *supra*, and accompanying text. The Chairman then explained that, in addition to the rights set forth in the letter of February 1, counsel for Mr. Powell would be permitted a reasonable length of time for oral argument and Mr. Powell would be

⁸ Letter from Emanuel Celler to Adam Clayton Powell, Jr., February 1, 1967, in *Hearings on H. Res. 1 Before Select Comm. Pursuant to H. Res. 1*, 90th Cong., 1st Sess. 5 (1967) (hereinafter *Hearings*). After a meeting of counsel for Mr. Powell and counsel for the Select Committee held on February 3, 1967, the Committee's chief counsel wrote to Mr. Powell's counsel on February 6, 1967, stating:

[T]he Select Committee desires to interrogate Mr. Powell [as to] paragraphs 1 to 11 of the "Conclusions" contained in the Report of the Committee on House Administration, Special Subcommittee on Contracts (pp. 6 and 7) relating to an investigation into expenditures during the 89th Congress by the House Committee on Education and Labor and the clerk-hire status of Y. Marjorie Flores (Mrs. Adam Clayton Powell).

Letter from William A. Geoghegan to Mrs. Jean C. Cahn, February 6, 1967, in *Hearings* 59.

⁹ Rule XI, paragraph 26, prescribes committee procedures. In addition to internal housekeeping provisions, it entitles a witness at any hearing to be accompanied by counsel, to submit statements in the discretion of the committee, and to obtain a transcript of testimony, upon payment of costs. H.R. Doc. No. 619, 87th Cong., 2d Sess. 364-68 (1963).

permitted to make a statement to the Committee on all matters as to which he was invited to testify.

Counsel for Mr. Powell moved that the Committee limit its inquiry to Mr. Powell's age, citizenship, and inhabitancy and that, because the scope of the Committee's inquiry was constitutionally limited to these three requirements, it immediately terminate its proceedings and report to the House that Mr. Powell was entitled to his seat.¹⁰ After oral argument on these motions Mr. Powell's counsel made several procedural motions asserting the invalidity of the Committee proceedings for failure to provide adequate notice and comply with the due process requirements of an adversary proceeding. In addition, certain specific procedural rights were requested:

1. Fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser.
2. The right to confront his accuser, and in particular to attend in person and by counsel, all sessions of this committee at which testimony or evidence is taken, and to participate therein with full rights of cross-examination.
3. The right fully in every respect to open and public hearings in every respect in the proceedings before the select committee.
4. The right to have this committee issue its process to summon witnesses whom he may use in his defense.
5. The right to a transcript of every hearing.¹¹

After the Committee took these motions under advisement, Mr. Powell was questioned by counsel for the Committee. After a few questions, Mr. Powell's counsel objected and insisted that Mr. Powell would not proceed further without a ruling on his pending motions. The Select Com-

¹⁰ Documentary evidence that Mr Powell met these three requirements had been previously submitted to the Committee and made part of the record at the hearings. *Hearings* 14-25. Briefs in support of these motions were filed by counsel for Mr. Powell and the American Civil Liberties Union.

¹¹ *Hearings* 54.

mittee then recessed and, upon reconvening, the Chairman denied all of the motions. With specific reference to the procedural motions, the Chairman said:

This is not an adversary proceeding. The committee is going to make every effort that a fair hearing will be afforded, and prior to this date has decided to give the Member-elect rights beyond those afforded an ordinary witness under the House rules.

The committee has put the Member-elect on notice of the matters into which it will inquire by its notice of the scope of inquiry and its invitation to appear, as well as by conferences with, and a letter from its chief counsel to the counsel for the Member-elect.

Prior to this hearing the committee decided that it would allow the Member-elect the right to an open and public hearing and the right to transcript of every hearing at which testimony is adduced.

The committee has decided to summon any witnesses having substantial relevant testimony to the inquiry upon the written request of the Member-elect or his counsel.

The Member-elect certainly has the right to attend all hearings at which testimony is adduced and to have counsel present at those hearings.¹²

After these rulings by the Chairman, Mr. Powell was interrogated, but upon advice of counsel he refused to answer any questions except those relating to his age, citizenship, and inhabitancy in New York. At the end of the February 8 hearing, the Chairman denied a request that Mr. Powell be permitted to make a statement at that time, suggesting that it should be renewed subsequently.¹³

By a letter of February 10, Mr. Powell was informed that the next hearing would be held on February 14. He was further advised that, upon written application, the Select Committee would summon any witnesses "having substantial relevant testimony to the inquiry . . ." The letter stated:

¹² *Hearings* 59.

¹³ *Hearings* 107.

The Select Committee has deferred decision on the question raised by the original motion of your counsel as to whether the qualifications for membership in the House, specifically enumerated in Article I, Section 2, of the Constitution, age, citizenship, and inhabitancy, should be deemed exclusive. Further, we are of the opinion that the Select Committee is required by House Resolution 1, 90th Congress, to inquire not only into the question of your right to take the oath and be seated as a member of the 90th Congress, but additionally and simultaneously to inquire into the question of whether you should be punished or expelled pursuant to the powers granted by the House under Article I, Section 5, Clause 2 of the Constitution. In other words, the Select Committee is of the opinion that at the conclusion of the present inquiry, it has authority to report back to the House recommendations with respect to your seating, expulsion or other punishment.¹⁴

Finally the letter queried whether in both the seating phase and the punishment and expulsion phase, Mr. Powell would refuse to testify about the legal proceedings against him and his alleged official misconduct. He was again invited to testify and advised he would be allowed to make a statement.

At the hearing on February 14, attended by Mr. Powell's attorneys but not by Mr. Powell, it was stated that Mr. Powell would not testify concerning the court proceedings or alleged official misconduct in either phase of the Committee's inquiry. Mr. Powell's attorneys reasserted their position that age, citizenship, and inhabitancy were the exclusive qualifications, and, further, took the position that no inquiry on the question of punishment or expulsion was possible until a Member had been seated, and that the two issues—seating and punishment or expulsion—could not be merged into one proceeding.¹⁵ The Select Committee then proceeded to hear evidence concerning the New York litigation involving Mr. Powell and evidence concerning the air

¹⁴ Letter from Emanuel Celler to Adam Clayton Powell, February 10, 1967, in *Hearings* 110.

¹⁵ *Hearings* 111-13.

travel, expense reimbursement and bank accounts of Mr. Powell and his associates.

Neither Mr. Powell nor his attorneys attended the final hearing of the Select Committee on February 16. At that time testimony was received from Mrs. Adam Clayton Powell (Y. Marjorie Flores) with respect to her financial affairs and those of her husband. Testimony was also received from a former assistant to Mr. Powell concerning disbursements for airplane travel. After the close of the hearings, counsel for Mr. Powell submitted another brief, reiterating the points previously raised.

On February 23, 1967, the Select Committee issued its report. Mr. Powell was found to be over 25 years of age, a United States citizen for more than 7 years, and, on the date of his election, an inhabitant of the State of New York.¹⁶ The Committee also found, however, that Mr. Powell had asserted an unwarranted privilege and immunity from the processes of the courts of the State of New York; had wrongfully and wilfully diverted House funds for use of others and himself, in his capacity as a Member of Congress and as a committee chairman; and had made false reports on expenditures of foreign exchange currency to the Committee on House Administration.¹⁷ Based on these findings of fact, the Select Committee recommended the adoption of a resolution stating:

1. That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-elect from the 18th District of the State of New York.

2. That upon taking the oath as a Member of the 90th Congress the said Adam Clayton Powell be brought to the bar of the House in the custody of the Sergeant-at-Arms of the House and be there publicly censured by the Speaker in the name of the House.

3. That Adam Clayton Powell, as punishment, pay to the Clerk of the House to be disposed of by him

¹⁶ The Committee report noted that no question as to Mr. Powell's age or citizenship had been raised but that members of the House and the public questioned his inhabitancy. H.R. REP. No. 27, 90th Cong., 1st Sess. 5 n. 7 (1967)

¹⁷ *Id.* at 31-32.

according to law, \$40,000. The Sergeant-at-Arms of the House is directed to deduct \$1,000 per month from the salary otherwise due the said Adam Clayton Powell and pay the same to said Clark, said deductions to continue while any salary is due the said Adam Clayton Powell as a Member of the House of Representatives until said \$40,000 is fully paid. Said sums received by the Clerk shall offset to the extent thereof any liability of the said Adam Clayton Powell to the United States of America with respect to the matters referred to in the above paragraphs 3 and 4 of the preamble to this resolution. [See pp. 12-13 *infra*.]

4. That the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. That if the said Adam Clayton Powell does not present himself to take the oath of office on or before March 13, 1967, the seat of the 18th District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.¹⁸

The report and proposed resolution of the Select Committee were presented to the House on March 1, 1967.¹⁹ Although notice of this submission had been published in the Congressional Record,²⁰ Mr. Powell did not appear in the House on March 1. The House extensively debated the proposed resolution, considering, *inter alia*, whether age, citizenship, and inhabitancy were the sole grounds for exclusion from membership in the House; whether the House should first seat Mr. Powell and then determine whether to punish or expel him; and whether a two-thirds vote would be required to exclude him on the basis of the Select Committee's findings. At the conclusion of debate, the House rejected, by a vote of 222 to 202, a motion to bring the

¹⁸ *Id.* at 34.

¹⁹ The relevant proceedings on March 1, 1967, are found at 113 Cong. Rec. H 1918-57 (daily ed. March 1, 1967).

²⁰ 113 Cong. Rec. D 108 (daily ed. Feb. 24, 1967).

resolution to an immediate vote. Mr. Curtis, of Missouri, offered an amendment to the Committee resolution; the thrust of the amendment was to exclude Mr. Powell and declare his seat vacant. At this point The Speaker ruled that a majority vote would be sufficient to pass the resolution if so amended.²¹ After further debate this amendment was adopted by a roll call vote of 248 to 176. The amended resolution was then agreed upon, 307 to 116. The Select Committee's proposed preamble was then adopted so that House Resolution 278, 90th Congress, 1st Session, in its final form read:

WHEREAS, The Select Committee appointed Pursuant to H. Res. 1 (90th Congress) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from Au-

²¹ 113 Cong. Rec. H 1942 (daily ed. March 1, 1967). Mr. Curtis, speaking to his proffered amendment, stated:

During the debate on the resolution, for which this is a substitute, I advanced my own theory on what power was derived from the power of expulsion. I said that I felt the power of expulsion very clearly implied the right of exclusion. I do not see how anyone can argue very seriously against this implied power.

Also, if this is true, then in my own judgment exclusion would require a two-thirds vote.

gust 14, 1964 to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C. or the State of New York as required by law.

Fourth, as Chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member; Now, therefore, be it

RESOLVED, That said Adam Clayton Powell, Member-Elect from the Eighteenth District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress, and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.

Thereafter, Appellants brought the suit from which the present appeal derives. Because of its importance to the resolution of the issues here presented, some attention must be devoted to the nature of the present claims. By their own statement of this case, Appellants sued the Members of the present House of Representatives in a class action. Their complaint in the District Court named Representatives John W. McCormack, Carl Albert, Gerald R. Ford, Emanuel Celler, Arch A. Moore, Jr., and Thomas B. Curtis "individually and, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, as representatives of a class of citizens who are presently serving in the 90th Congress as members of the House of Representatives." Speaker McCormack was also named in his official capacity. The Clerk of the House of Representatives, the Sergeant-at-Arms and the Doorkeeper were each named individually and in their official capacities.

Appellants' complaint challenged the action of the House by claiming that "House Resolution No. 278 is null and

void and in violation of the Constitution of the United States, in particular Article I, Section 2(2) thereof which sets forth the exclusive qualifications for membership in the House of Representatives," and also because "it violates Article I, Section I of the Constitution of the United States which provides that members of the House shall be elected by the people of each state." It further alleged that the House action violated the "basic rights" of the electors of the 18th Congressional District of New York and that, as non-white citizens, these electors were being denied their rights under the fifth, thirteenth, and fifteenth amendments, and, as females, certain of the electors were being denied their rights under the nineteenth amendment. The complaint also attacked House Resolution 278 as a bill of attainder, an ex post facto law and as cruel and unusual punishment. Appellants further asserted that the hearings conducted by the Select Committee violated the fifth and sixth amendments by denying "the elemental rights of due process, including but not limited to notice of charges, the right of confrontation of witnesses, effective representation by counsel who could cross-examine witnesses in regard to any matter alleged. . . ."

Appellants' complaint also challenged the actions of certain of the individuals here sued as follows. Speaker McCormack was alleged to have violated the fifth amendment in declaring a vacancy in the 18th Congressional District contrary to Article I, section 2(4), (5), section 3(6), (7) and section 5(2), and 2 U.S.C. § 8 (1964). The Speaker was also challenged for his refusal to administer the oath to Mr. Powell ("under color and authority of his office and the illegal and unconstitutional actions of the House of Representatives") and for his threat to exclude Mr. Powell from occupancy of his office space. The complaint further stated that the Clerk of the House threatened to refuse to perform the service for Mr. Powell to which a duly-elected Congressman is entitled, that the Sergeant-at-Arms refused to pay Mr. Powell his salary, and that the Doorkeeper threatened to refuse to admit Mr. Powell to the House Chamber.

We take special notice of the manner in which Appellants characterized their action: "this is a proceeding to restrain the enforcement, operation or execution of House Resolu-

tion No. 278. . . ." The relief prayed for by the Appellants was that a statutory three-judge court be convened, that it grant a permanent injunction restraining Appellees from executing House Resolution 278, and that it issue a permanent injunction restraining Speaker McCormack from refusing to administer the oath, the Clerk from refusing to perform the duties due a Member of the House, the Sergeant-at-Arms from refusing to pay Mr. Powell, and the Doorkeeper from refusing to admit Mr. Powell to the Chamber. The requested injunction would also restrain the named Representatives "and all other members of the class of citizens they represent who are members of the House of Representatives from taking any action to enforce House Resolution No. 278 or any other action which will deny to plaintiff Adam Clayton Powell, Jr., the right to be seated. . . ." The complaint also asked for declaratory judgment that the denial of his seat violated the Constitution. In addition, Appellants requested writs of mandamus to require Speaker McCormack to administer the oath of office and to compel the relief requested against the other named officials. Finally, Appellants requested preliminary injunctions granting similar relief pending adjudication of the claims.

After detailed pleading and arguments of counsel, the District Court denied Appellants' application for a three-judge court, dismissed the complaint "for want of jurisdiction of the subject matter," and denied the motion for a preliminary injunction. *Powell v. McCormack*, 266 F. Supp. 354, 360 (D. D.C. 1967). On April 27, 1967, this court denied Appellants' motion for summary reversal. Appellants' petition for writ of certiorari prior to judgment in this court was denied by the Supreme Court on May 29, 1967, *Powell v. McCormack*, 387 U.S. 933 (1967).

While these legal proceedings were pending Mr. Powell was re-elected to the House of Representatives on April 11, 1967. The formal certification of election was received by the House on May 1, 1967. Mr. Powell has not presented himself again to the House or asked to be given the oath of office.

Claims and Issues

The issues on this appeal raise profound questions of constitutional law which go to the very heart of our form of government of powers delegated to separate branches by a written constitution. Inextricable are fundamental aspects of our commitment to representative government with elected legislators responsible directly to the people.

Appellants contend:

- (a) that dismissal of the complaint in the District Court for want of jurisdiction was error;
- (b) that the claims are justiciable;
- (c) that refusal to seat Mr. Powell who was over twenty-five years of age, more than seven years a citizen and an inhabitant of New York violated Article I, sections 2 and 5 of the Constitution;
- (d) that House Resolution 278 inflicted on Mr. Powell a punishment in violation of the Constitution;
- (e) that Mr. Powell's exclusion from the House violated Due Process;
- (f) that Mr. Powell's exclusion from the House violated rights of the voters of his district to a free choice of their representative;
- (g) that federal courts have power to grant relief requested; and
- (h) that the District Court erred in refusing to certify the necessity for a three-judge court.

The Appellees contend:

- (a) that the Speech or Debate Clause of Article I is an absolute bar to the action;
- (b) that there is no federal subject matter jurisdiction;
- (c) that the complaint presents a political question; and
- (d) that the claims asserted are not justiciable.

Constitutional Provisions

Because we will have frequent occasion to refer to the text of certain constitutional provisions, we set out here some of the pertinent sections involved in this case:

Art. I, § 2, clause 2: "No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State in which he shall be chosen."

Art. I, § 5, clause 1: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a small Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide."

Art. I, § 5, clause 2: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

Art I, § 6, clause 1: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Art. III, § 2, clause 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;"

PART I

CAN THE COURT ACT?

JURISDICTION

Historically there have been at least two concepts of the exercise of federal jurisdiction. One is the classical concept that once jurisdiction was found, a court could not decline to act. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), for example, Chief Justice Marshall articulated the view that:

We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2-9 (1959). A second view is that, where a court finds jurisdiction, it may nevertheless decline to exercise its power. L. HAND, *THE BILL OF RIGHTS* 14-18 (1958); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 339 (1923).²²

Much of what has been said and written on the concepts of jurisdiction, discretionary jurisdiction, justiciability, case or controversy, and political question, and any effort to fix firm boundaries defining these concepts, is now merged into a series of cases,²³ the most significant of which for our purposes is *Baker v. Carr*, 369 U.S. 186 (1962). Almost imperceptibly at first, but quite clearly by the 1962 holding in *Baker*, the Supreme Court had established more comprehensive guidelines for identifying federal subject matter jurisdiction and justiciability. Since the present case turns on a constitutional grant of power to a co-equal branch, the application of these guidelines will present what Mr. Justice Brennan termed in *Baker*, "a delicate exercise in constitutional interpretation," *id* at 211.

When a court finds that the subject matter of the case is inappropriate for judicial consideration, *Baker* now establishes that it is nonjusticiable and the court declines to exercise admitted jurisdiction:

The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack

²² Both competing theories are discussed in BICKEL, *THE LEAST DANGEROUS BRANCH* 46-65 (1962). Professor Bickel himself comes very close to the second concept in his views on prudential techniques for avoiding the exercise of jurisdiction. Bickel, *Foreward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). A more thorough analysis is set forth in Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

²³ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Colegrove v. Green*, 328 U.S. 549 (1946); *Coleman v. Miller*, 307 U.S. 433 (1939).

of federal jurisdiction or upon the inappropriateness of the subject matter for judicial consideration—what we have designated “nonjusticiability.” The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court’s inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not “arise under” the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a “case or controversy” within the meaning of that section; or the cause is not one described by any jurisdictional statute.

Baker v. Carr, *supra*, at 198 (emphasis added).

The difficulties arising from the terms used on this elusive subject are suggested by the comments of other members of the Court in *Baker*. Mr. Justice Harlan, for example, described the majority holding as an “abrupt departure . . . from judicial history.” He went on to note:

Once one cuts through the thicket of discussion devoted to “jurisdiction,” “standing,” “justiciability” and “political question,” there emerges a straightforward issue. . . . Does the complaint disclose a violation of a federal constitutional right . . . , a claim over which a United States District Court would have jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983? The majority opinion does not actually discuss this basic question, but, as one concurring Justice [Stewart] observes, seems to decide it “*sub silentio*.” *Ante*, p. 261.

Baker v. Carr, *supra*, at 330-31 (Harlan, J., dissenting).

In *Baker*, where the Court was dealing with state action, what the Court said, perhaps as much as what it did, staked out something of the new dimensions of federal subject

matter jurisdiction, justiciability, the political question and other doctrines. If *Baker* was, as Mr. Justice Frankfurter thought, "a massive repudiation of the experience of our whole past," *id.* at 267 (dissenting opinion), it is a holding which points the way for us as to the issues of jurisdiction and justiciability.

Mr. Justice Brennan in *Baker* enumerated three criteria each of which must be present to establish the existence of federal subject matter jurisdiction:

- (1) the cause must "arise under" the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of Article III, section 2), and
- (2) the cause must be a "case or controversy" within the meaning of Article III, section 2, and
- (3) the cause must be described in a jurisdictional statute enacted by Congress.

Id. at 198.

1. *Arising Under the Federal Constitution.*

Subject to congressional enactment, Article III, section 2, grants federal courts jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;" In 1875 Congress used similar language in a statute granting federal courts general and original jurisdiction over such cases. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. See 28 U.S.C. § 1331(a) (1964). A commentator has recently noted that:

[t]he key phrase, both in the Constitution and in the statute, is "arises under." Though the meaning of this phrase has attracted the interest of such giants of the bench as Marshall, Waite, Bradley, the first Harlan, Holmes, Cardozo, and Frankfurter, and has been the subject of voluminous scholarly writing, it cannot be said that any clear test has yet been developed to determine which cases "arise under" the Constitution, laws, or treaties of the United States.

C. WRIGHT, *FEDERAL COURTS* 48 (1963).

Appellants' complaint in the District Court is predicated on the several Article I powers of the House, Article III, and on the Bill of Rights and Civil Rights Amendments. Neither the litigants nor the District Court²⁴ challenged the substantiality and importance of the constitutional claims, one of the most significant factors in the determination of subject matter jurisdiction.²⁵ Thus, leaving for subsequent discussion the question of whether the case "arises under" in the context of the statutory grant of jurisdiction, this case would appear to present a substantial claim which arises "directly" under the Constitution,²⁶ and thus "arises under" in the context of the constitutional grant of jurisdiction of Article III. This conclusion is fortified by the broad reading given to Article III by Chief Justice Marshall in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846-58 (1824). See WRIGHT, *supra*, at 48-52; Chadbourne & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 649 (1942).

Appellees argue that the issue presented by this case arises exclusively and finally under Article I, section 5, and thus the case is withdrawn from the judicial power articulated in Article III. Their argument, which has the support of various contemporary constitutional authorities,²⁷ is that the text of the Constitution—"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members"—carved out from the Article III judicial powers all jurisdiction of the courts to review congressional judgment under this clause. Stated in another way, Appellees' argument is that the Constitution assigned this special

²⁴ *Powell v. McCormack*, 266 F. Supp. 354, 355-56 (D. D.C. 1967).

²⁵ Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, or "trivialous," *Bell v. Hood*, 327 U.S. 678, 683. That the claim is unsubstantial must be "very plain." *Hart v. Keith Vaudeville Exchange*, 262 U.S. 271, 274.

Baker v. Carr, *supra*, at 199 (footnote omitted).

²⁶ Mishkin, *The "Federal Question" in the District Courts*, 53 COLUM. L. REV. 157, 165-68 (1953).

²⁷ See Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36 (E. Cahn ed. 1954); Scharpf, *supra* note 22, at 539-40; Wechsler, *supra*, at 8.

kind of judging function to the Legislative Branch.²⁸ If so, it is the Constitution's allocation of powers that requires this result, rather than any failure of the claim to arise under the Constitution. Article III grants judicial power to cases "arising under" the Constitution *as a whole*, not under any particular provision of it.

2. *Case or Controversy.*

It is clear from the debates at the Philadelphia Convention that the Framers intended Article III's requirement of "case or controversy" to mean cases or controversies "of a judiciary nature." *E.g.*, 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (rev. ed. 1966). Analysis of English and Colonial precedents shows that after a long and bitter struggle judicial bodies were denied the power of review over legislative judgments concerning elections and qualifications of members. See 1 H. REMICK, THE POWERS OF CONGRESS IN RESPECT TO MEMBERSHIP AND ELECTIONS 1-62 (1929); see generally M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES (1943); C. WITKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (1921). Nothing at the Convention suggests that the "case or controversy" language of Article III was intended to change this familiar and historical allocation of powers. See 2 M. FARRAND, *supra*, at 39, 132-33, 186. Indeed, where departures from English precedents were intended they were explicitly written into Article III; for example, the provision extending judicial power to include cases in equity, 2 *id.* at 428.

No cases have been cited as directly holding, and our search has not revealed any basis for saying, that a claim to a seat in the House is of a kind traditionally the concern of courts in the sense, for example, that Mr. Justice Frankfurter viewed traditional cases as those which English courts dealt with at the time of our Convention, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frank-

²⁸ Appellees' argument finds its local basis in the classical theory of judicial review previously discussed. Under that view, as Professor Wechsler noted, the primary question is whether the Constitution commits the "autonomous determination" of the issue to another coordinate branch. Wechsler, *supra*, at 7-9.

furter, J., concurring); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring); see *Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U.S. 563, 568 (1939). All traditions must have a genesis, however, and legal traditions are no exception. One might view *Bond v. Floyd*, 385 U.S. 116 (1966), for example, as departing from existing federal traditions when it found jurisdiction over a state legislator's claim to his seat. It is interesting, however, that nowhere in the opinions of the three-judge *Bond* court is there any discussion of "case or controversy." *Bond v. Floyd*, 251 F. Supp. 333 (N.D. Ga. 1966). Nor did the Supreme Court opinion in *Bond* elaborate on the "case or controversy" aspect. The presence of a case or controversy was seemingly taken for granted or decided sub silentio. The same is true in *Baker v. Carr*. Although Baker explicitly tabulates "case or controversy" as one of three indispensable factors for jurisdiction, nowhere in that opinion is there any discussion indicating just how the reapportionment of state electoral districts fell within the scope of matters "of a judiciary nature."²⁹ Yet the holding plainly assumes that a case or controversy was presented.

Against this background we can hardly conclude that Mr. Powell's claim to a seat in the House fails to present a case or controversy as those terms must now be construed.

3. Statutory Grant of Jurisdiction.

Even where the requisites of Article III, section 2 are met—that is, the claim presents a case or controversy which "arises under" the Constitution or laws of the United States—jurisdiction of Federal courts is dependent on an affirmative grant by Congress. U.S. CONST. art. III, § 1; *Baker v. Carr*, *supra*, at 198; *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

Our examination of the various jurisdictional statutes relied upon by Appellants reveals that jurisdiction can be based only on 28 U.S.C. § 1331(a) (1964),³⁰ the relevant pro-

²⁹ The Court merely stated: "Our conclusion . . . that this cause presents no nonjusticiable 'political question' settles the only possible doubt that it is a case or controversy." *Baker v. Carr*, *supra*, at 198.

³⁰ Appellants also rely on the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1964), and the Three Judge Court statute, 28 U.S.C. § 2282

vision of which is: "The district courts shall have original jurisdiction of all civil actions . . . [which arise] under the Constitution, laws, or treaties of the United States." Although there is a paucity of legislative history for the statute, *see generally* FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65-69 (1927), commentators agree that a broad grant of jurisdiction was intended. Mishkin, *supra* note 26, at 160; Chadbourn & Levin, *supra*, at 644-45 (1942); Forrester, *The Nature of a "Federal Question,"* 16 *TULANE L. REV.* 362, 374-85 (1942). We have already determined that this case "arises under" for the purposes of the Article III definition of judicial power. While section 1331 is not to be equated with the potential for federal jurisdiction in Article III, *see, e.g.,* *Zwickler v. Koota*, 389 U.S. 241, 246-47 n.8 (1967), and cases cited therein, we conclude that the statute is broad enough to operate as an affirmative jurisdictional grant here. *See, e.g.,* *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-14 (1936); Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 *MICH. L. REV.* 17, 39-45 (1947)²¹.

(1964), but it is clear that these statutes are not jurisdictional. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950) (declaratory judgment); *Cadillac Publishing Co. v. Summerfield*, 97 U.S. App. D.C. 14, 227 F.2d 29, *cert. denied*, 350 U.S. 901 (1955) (same); *Van Buskirk v. Wilkinson*, 216 F.2d 735 (9th Cir. 1954) (three judge court). The civil rights statutes relied upon, 42 U.S.C. §§ 1971(a)(1), 1981, 1983 (1964), and 42 U.S.C. § 1971(a)(2) (1964), as amended, § 15, 79 Stat. 445 (1965), are not applicable because they deal either with state action or with specific acts of voter discrimination which are not alleged to have been involved here. Appellants' final jurisdictional predicate, 28 U.S.C. § 1343(4) (1964) is equally unavailing. To the extent that it might confer jurisdiction as to federal deprivation of civil rights protected by Acts of Congress, those very acts, we have just noted, are not applicable here.

²¹ Appellees argue that 28 U.S.C. § 1344 (1964), jurisdiction to recover possession of office but excluding the office of Representative in the House, plainly denied jurisdiction in cases like this. *See Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), *cert. denied*, 336 U.S. 904 (1949). That statute, however, is limited to election disputes. In addition, it requires that the sole question involved arise out of the denial of voting rights on account of race, color or servitude.

For other dismissals based on lack of a jurisdictional statute see *Peterson v. Sears*, 238 F. Supp. 12 (N.D. Iowa 1964) (suit to enjoin voting officials from unlocking voting machines after congressional election); *Keogh v. Horner*, 8 F. Supp. 933 (S.D. Ill. 1934) (suit for writ of prohibition against Governor's issuance of certificate of election of Congressman).

PART II

SHOULD THE COURTS ACT?

• JUSTICIABILITY—DISCRETION TO ACT

Having found that under *Baker* jurisdiction arises, we now turn to the inquiry as to the appropriateness or inappropriateness of the subject matter of Appellants' claims for judicial consideration. Absent federal subject matter jurisdiction there would be nothing on which a court could act, but "in the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather the court's inquiry necessarily proceeds" to determine whether a duty and its breach can be identified and determined and a remedy molded. *Baker v. Carr, supra*, at 198.

Appellees argue that the cause presents on its face a "political question."³² But the fact that a claim seeks the enforcement of a political right or a claim to political office, as here, does not necessarily mean that it raises a "political question." See, e.g., *Bond v. Floyd, supra*. The term "political" has been used to distinguish questions which are essentially for decision by the political branches from those which are essentially for adjudication by the judicial branch.

In some areas the political question can be readily discerned; for example, the conduct of foreign policy is vested exclusively in the Executive, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), whereas the power to declare war or raise armies is vested in the Congress, U.S. CONST. art. 1, § 8. Even in these areas questions can arise on the peripheries so that the labels of "foreign policy" or "state of war" are not automatic barriers to all

³² The standard authorities on the nature of a "political question" are: Frank, *supra* note 27, at 36-43; POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1926); McCloskey, *Forward: The Reapportionment Case*, 76 HARV. L. REV. 54, 59-64 (1962); Scharpf, *supra* note 22; Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

judicial scrutiny, e.g., *The Three Friends*, 166 U.S. 1, 63-66 (1897); *Baker v. Carr*, *supra*, at 212-13, and cases cited therein. No purpose would be served in pursuing delineation and we refer to it only to indicate that the law does not pivot on labels, even those of constitutional origin.

Appellees stress the applicability of a series of cases containing language indicating that the exercise of congressional power to judge the qualifications of Members is beyond the scope of the judicial power, i.e., the courts have no jurisdiction at all. In the cases cited to us, either the issue of jurisdiction was never reached³³ or the language relied upon is dictum.³⁴ Nevertheless, we note that they treat this congressional power as exclusive.³⁵

The only holding of this court which bears directly on the issue is *Sevilla v. Elizalde*, 72 App. D.C. 108, 112 F.2d 29 (1940). In *Sevilla*, a resident of the Philippine Commonwealth sought a bill in equity to enjoin the resident commissioner of the Philippines from holding office because he lacked the requisite qualifications. The qualifications were specified in the Independence Act which provided for the resident commissioner to have a seat but no vote in the United States House of Representatives. The court characterized his role partly as a diplomatic resident of a "foreign" state and partly as a territorial delegate to Congress. Noting that the question of the 'qualifications of foreign diplomats was committed to the Executive, and the question of the qualifications of a delegate was committed to Congress, this court held that the case presented a political question:

³³ *E.g.*, *Seymour v. United States*, 77 F.2d 577, 584 (8th Cir. 1935).

³⁴ *Reed v. County Commissioners*, 277 U.S. 376, 388 (1928); *Jones v. Montague*, 194 U.S. 147, 153 (1904); *Johnson v. Stevenson*, 170 F.2d 108, 110 (5th Cir. 1948); *cert. denied*, 336 U.S. 904 (1949); *Application of James*, 241 F. Supp. 858, 860 (S.D. N.Y. 1965); *Peterson v. Sears*, 238 F. Supp. 12, 13-14 (N.D. Iowa 1964); *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934); *In re Voorhis*, 291 Fed. 673, 675 (S.D. N.Y. 1923).

In three of these cases, *Johnson*, *Peterson*, and *Keogh*, the decision was based on lack of an appropriate jurisdictional statute.

³⁵ For state cases to a similar effect see *Laxalt v. Cannon*, 80 Nev. 588, 397 P.2d 466 (1964); *In re Williams' Contest*, 198 Minn. 516, 270 N.W. 586 (1936).

Courts have no jurisdiction to decide political questions. These are such as to have been entrusted by the sovereign for decision to the so-called political departments of government, as distinguished from questions which the sovereign has set to be decided in the courts.

Article I, section 5 of the Constitution provides that "each house shall be the judge of the elections, returns and qualifications of its own members." . . . And the Supreme Court has recognized that although these powers are judicial, as distinguished from legislative or executive, in type, they have nevertheless been lodged in the legislative branch by the Constitution.

Id. at 111, 116, 112 F. 2d at 32, 37. The *Sevilla* holding standing alone might well be dispositive of the instant appeal but it must be read in light of cases since then culminating in *Baker*.

The Supreme Court case on which the *Sevilla* court relied in reaching its conclusion is *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929). There a Senate investigation into the election of a Senator involved the subpoena of a witness to testify as to the source of campaign contributions. He refused and the Senate ordered him arrested and brought to the Chamber. The Supreme Court held that the Senate had the power to bring a witness before it by arrest warrant pursuant to the exercise of its power to judge the qualifications of its Members.³⁶ More importantly, the Supreme Court noted that the power to judge encompassed the power to "render a judgment which is beyond the authority of any other tribunal to review," *id.* at 613. See Mr. Justice Douglas' concurring opinion in *Baker v. Carr*, *supra*, at 242 n.2: "Of course each House of Congress, not the Court, is 'the Judge of the Elections, Returns and Qualifications of its own Members.' "

Nonjusticiability of a question because it is found to be

³⁶ In *Barry* the Senate was not judging qualifications in the sense here involved but inquiring into whether, because of fraud and illegal conduct of the candidate, no "election" had been held.

essentially political is declared by *Baker* to be a doctrine peculiar to confrontations within the *federal* establishment and derives from the fundamental structure of our system of divided and separate powers.³⁷ In *Baker* and *Bond* any possible confrontation was between federal power and a state. Cautiously avoiding any attempt to state the exclusive criteria for identifying a political question, Mr. Justice Brennan in *Baker* suggested six factors to be found "prominent on the surface" of a political question case. They bear re-statement:

- [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- [2] or a lack of judicially discoverable and manageable standards for resolving it;
- [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- [5] or an unusual need for unquestioning adherence to a political decision already made;
- [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, *supra*, at 217.

Treating these as "symptoms" of a nonjusticiable political question, rather than as the exclusive criteria for identifying one, we turn to their application to this record, hav-

³⁷ [I]n the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

Baker v. Carr, *supra*, at 210. See McCloskey, *supra* note 32, at 62.

Luther v. Borden, 48 U.S. (7 How.) 1 (1849), is the foremost of the guaranty clause cases. Although the dispute there arose within a state, the court focused on the potential conflict between the federal judicial power and the obligation of the legislative and executive branches to fulfill the guaranty clause.

ing in mind that under *Baker* the presence of any one of these six factors may be a bar to justiciability. This much *Baker* has settled.

(1) Article I, section 5 of the Constitution would seem in plain terms to vest in the House "a textually demonstrable constitutional commitment of the issue" of a judging function concerning the elections, returns and qualifications of its own Members. The language that "Each House shall be the judge" can hardly mean less than the the Members, for this purpose, become "judges," withdrawing judging of qualifications from the judicial branch.

Mr. Powell and the class Appellants contend that what was textually committed to the House by Article I, section 5, was the narrow power to judge whether a Member-elect met the Article I, section 2, criteria of age, citizenship and inhabitancy and no more. On its face, section 5 commits the power to judge qualifications to the House *in some measure*.³⁵ Although it may not be necessary to decide whether the power is confined to section 2 criteria or limited in some other respect, it is clear that a general power of judging has been committed by the Constitution to the House. If other factors, now to be considered, render the claims inappropriate for consideration, we need not rely on what seems to be a textural commitment.

(2) Are there "judicially discoverable and manageable standards for resolving" the issues raised? Laying aside for the present the availability of an efficient judicial remedy, it would be difficult to say that there are no "manageable standards" for adjudicating the issues raised. Familiar judicial techniques are available to construe the meaning of Article I, section 2, criteria of age, citizenship, and inhabitancy and to decide whether these are the sole grounds on which a Member-elect may constitutionally be excluded. The language of *Baker*, "manageable standards for resolving"

³⁵ Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Baker v. Carr, *supra*, at 211 (emphasis added.)

the claims, must, however, be read in light of the earlier formulation inquiring "whether protection for the right asserted can be judicially molded." When we consider whether the available "manageable standards" are adequate for resolving the question in the sense of solving and settling it, we are forced to conclude that courts do not possess the requisite means to fashion a meaningful remedy to compel Members of the House to vote to seat Mr. Powell or to compel The Speaker to administer the oath.

(3) This case does not present aspects to which the third criterion of *Baker* applies since the determination of the scope of a constitutional grant of power is not an "initial policy determination of a kind clearly for non-judicial discretion," such as a declaration of war.

(4) It is difficult to see, assuming a decision favorable to Mr. Powell, that there could be an efficient judicial resolution which was contrary to the action of the House "without expressing lack of respect due coordinate branches of government." Appellants urge that the courts should not concern themselves with the prospect of a direct confrontation because Members of the House, or a majority of them, would as a matter of comity, respect a holding of this court and abide by its rulings. The issue is not, however, what reaction could be expected from the coordinate branch, but the nature of the judicial mandate requested. Assuming that the House would yield, this does not show that our mandate would not indicate disrespect for a coordinate branch.

(5) There does not seem to be present, except as it arises out of paragraphs (1) and (4) above, "an unusual need for unquestioning adherence to a political decision already made." This fifth criterion of *Baker* has no direct relevance here as it would for example to a specific foreign policy determination within the scope of Executive power. See, e.g., *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Eminente v. Johnson*, 124 U.S. App. D.C. 56, 361 F.2d 73, cert. denied, 385 U.S. 929 (1966); *Pauling v. McNamara*, 118 U.S. App. D.C. 50, 331 F.2d 796 (1963), cert. denied, 377 U.S. 933 (1964).

(6) There is, in only a limited sense, and perhaps not at all in the sense contemplated by *Baker*, a "potentiality of embarrassment from multifarious pronouncements by var-

ious departments on one question." However, if we view the risk of conflicting pronouncements by the House and the courts as within this criterion, the potential for embarrassment is rather obvious. A judicial mandate to seat Mr. Powell would in effect be a command to The Speaker to administer the oath contrary to the terms of House Resolution 278. The command to seat Mr. Powell might be obviated were we to hold that our mandate constituted an "equity substitute" for a resolution of the House, the effect of which would be to treat him as having been sworn and seated. But the resulting confusion from such conflicting pronouncements seems clear.

It would therefore appear that not one but probably several of the *Baker* "symptoms" of nonjusticiability are prominent on the surface of the claims asserted and indeed are inextricable from them; this alone might well be sufficient to warrant a conclusion of "the inappropriateness of the subject matter for judicial consideration." *Baker v. Carr, supra*, at 198. *Baker*, it will be recalled, emphasizes the difference between jurisdiction and justiciability. After stating that the distinction "is significant," the Court noted:

In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding *whether the duty asserted can be judicially identified, its breach judicially determined, and whether protection for the right asserted can be judicially molded.*

Ibid (emphasis added).

If we read "duty" and "breach" in the conventional judicial sense, good arguments can be advanced that we can judicially identify the asserted duty of the House to seat a qualified Member-elect, and that a breach of such a duty can, in the abstract, be judicially determined. We will assume, *arguendo*, that these hurdles are cleared. However, when we come to the next inquiry, "whether protection for the right asserted can be judicially molded," we are confronted with problems quite different from and indeed not present in adjudications of conventional equitable claims or

claims involving state action. Although Professor Wechsler was not pointing to precisely the problem we have here, his characterization of political questions is apropos: "what is crucial . . . is not the nature of the question but the nature of the answer that may validly be given by the courts." Wechsler, *supra*, at 15.

In *Baker*, the Supreme Court concluded that protection for the rights arising under the equal protection clause could be molded, saying "we have no cause at this stage to doubt the District Court will be able to fashion relief. . . ." *Baker v. Carr*, *supra*, at 198. No further elucidation of this is found in the Court's opinion. The only other reference to the scope and mechanics of the relief to be molded is the comment of Mr. Justice Douglas that "any relief accorded can be fashioned in the light of well-known principles of equity." *Id.* at 250 (Douglas, J., concurring opinion).

Can the District Court mold relief which will protect the rights here asserted? Looking first to the complaint in the District Court, we find that after the prayer for a three-judge court, the complaint asks judgment:

- (1) to enjoin execution of House Resolution 278;
- (2) to require The Speaker of the House to administer the oath to Mr. Powell;
- (3) to enjoin all Members of the House from any action to enforce Resolution 278 or otherwise to deny Mr. Powell his seat;
- (4) for declaratory judgment declaring House Resolution 278 null and void;
- (5) for injunctive and mandatory relief addressed to non-elected employees of the House relating to access to the House, pay, and other prerequisites of the office of a Member.

Any judgment which enjoined execution of House Resolution 278, or commanded the Speaker of the House to administer the oath, or commanded Members of the House as to any action or vote within the Chamber would inevitably bring about a direct confrontation with a co-equal branch and if that did not indicate lack of respect due that Branch, it would at best be a gesture hardly comporting with our

ideas of separate co-equal branches of the federal establishment. These circumstances would give rise to a classic political question and fall within the definition of such a question under *Baker*. On this record, therefore, the claims of Appellants for coercive equitable relief are inappropriate for judicial consideration.

Appropriateness of Subject Matter for Declaratory Relief

Although we have determined that we cannot mold relief in coercive form, we next consider Appellants' claims for a declaratory judgment independent of the coercive equitable relief sought.³⁹ Cf. *Zwickler v. Koota*, 389 U.S. 241, 253-54 (1967). The Declaratory Judgment Act provides:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201 (1964).⁴⁰

A declaratory judgment is *sui generis*, neither strictly legal nor equitable, *United States Fidelity & Guar. Co. v. Koch*, 102 F.2d 288, 290-91 (3d Cir. 1939). In common with equitable relief, however, it recognizes judicial competence

³⁹ One of the reasons, not present here however, that declaratory relief should be considered independently of other relief is the fact that coercive relief "looks only to some immediate need, whereas the declaration of rights, by clarifying the legal relations, has prospective value in stabilizing the legal position" BORCHARD, *DECLARATORY JUDGMENTS* 433 (2d ed. 1941).

⁴⁰ All authorities agree that the purpose of a declaratory judgment is to settle actual controversies before they ripen into violations of law or breaches of duty and to afford relief from uncertainty and insecurity by a "premature" adjudication. See, e.g. BORCHARD, *supra*, note 39, at 299; *Luckenbach S.S. Co. v. United States*, 312 F.2d 545 (2d Cir. 1963); *Scott-Burr Stores Corp. v. Wilcox*, 194 F.2d 989 (5th Cir. 1952).

to declare rights without imposing a duty to do so, i.e., its exercise is discretionary. *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111, 112 (1962).⁴¹ It is clear that this discretion must be exercised judiciously and cautiously, with regard for the circumstances of the case and the purpose of a declaratory judgment. The Supreme Court recently noted:

[T]he propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness *informed by the teachings and experience concerning the functions and extent of federal judicial power.*

Public Serv. Comm'n v. Wykoff, *supra* note 41, at 243 (emphasis added). Some of the same factors which led us to hold that judicial consideration of the claims was not appropriate, dictate a holding that we decline to undertake declaratory relief. Declaratory relief in this case is particularly inappropriate since it could not finally terminate the controversy,⁴² indeed, it might well tend to resurrect the very conflict our holding of inappropriateness seeks to avoid.⁴³ Our conclusion is reinforced by Mr. Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), which, although modified in other aspects by *Baker* and its progeny, remains relevant with respect to the discussion of declaratory judgments:

And so, the test for determining whether a federal court has authority to make a declaration such as is

⁴¹ See *Zemiel v. Rusk*, 381 U.S. 1 (1965); *Public Serv. Comm'n v. Wykoff Co.*, 344 U.S. 237 (1952); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942); *Lampkin v. Connor*, 123 U.S. App. D.C. 371, 360 F.2d 505 (1966); *Marcello v. Kennedy*, 114 U.S. App. D.C. 147, 312 F.2d 874 (1962), *cert. denied*, 373 U.S. 933 (1963).

⁴² Cf. *Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren*, 204 F.2d 256, 258 (7th Cir. 1953); *United States v. Jones*, 176 F.2d 278, 280 (9th Cir. 1949).

⁴³ See *Sellers v. Johnson*, 69 F. Supp. 778, 786 (S.D. Iowa 1946), *rev'd on other grounds*, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948); *Doehler Metal Furniture Co. v. Warren*, 76 U.S. App. D.C. 60, 129 F.2d 43 (1942) (dictum).

here asked, is whether the controversy "would be justiciable in this Court if presented in a suit for injunction. . . ." *Nashville C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 262.

Id. at 551-52. See also *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1934); 6A MOORE, FEDERAL PRACTICE ¶ 57.14, at 3078 (2d ed. 1964) ("The Declaratory Judgment Act does not attempt, nor can it be used to avoid this fundamental judicial principle [political questions].").

The Claims of Voters

We cannot be unmindful of the claims which relate to the highly important constitutional rights to vote and to be represented by the choice reflected by the voting process. These are by no means unimportant claims. The "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); see *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964). The right of all voters who meet a state's qualifications to vote is protected by the Constitution and by congressional acts, *Ex Parte Yarbrough*, 110 U.S. 651 (1884); *United States v. Classic*, 313 U.S. 299 (1941), and the qualifications established by the states may not discriminate either in terms of race or color, U.S. CONST. amend. XV, or in terms of sex, U.S. CONST. amend. XIX, or by weighing unfairly the votes of those in one geographical area or electoral district over the votes of others, e.g., *Wesberry v. Sanders*, *supra*.

The rights so protected, however, relate to the initial right to vote—the right to say who shall be the representative. They do not directly extend to the right to have that particular representative be seated in Congress under all circumstances. The Constitution itself, as we have noted earlier, sets explicit limits on the right of electors to have whomever they choose sit in Congress: it fixes eligibility requirements of age, citizenship and inhabitancy in Article I, section 2; additionally Congress can determine the times, places and manners of holding the elections under

Article I, section 4; and Congress is granted exclusion and expulsion powers. Certainly these provisions make clear that the carefully guarded right to vote for whomever the elector desires does not necessarily carry with it a concomitant right to have that person seated in the Congress. In *United States v. Classic*, *supra*, the Court made clear that the right is not absolute: "That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I *and elsewhere in the Constitution*, was one of the great purposes of our constitutional scheme of government cannot be doubted," *id.* at 316 (emphasis added).⁴⁴

We have already noted that the holding in *Bond v. Floyd*, *supra*, was bottomed on state action which imposed a penalty on Bond for exercising his first amendment rights to discuss public issues. The Supreme Court's rationale would apply equally if Bond had been excluded from the state university because of his speeches. The Court did not reach the question of the standing of Bond's constituents to assert claims on their own behalf. *Id.* at 137 n. 14. The class Appellants have not argued their claims in terms of first amendment rights, but lurking in the language of the Court in *Bond* can be detected some hint of a possible relationship between first amendment rights to political

⁴⁴ We think the language of the court in *Barry v. United States ex rel. Cunningham*, *supra*, while not directly dealing with the right to vote as here developed, is relevant to the relationship between the power of Congress to exclude or expel and the right of a citizen to vote:

The equal representation clause is found in Article V which authorizes and regulates amendments to the Constitution, "provided, . . . that no state, without its consent, shall be deprived of its equal suffrage in the Senate." This constitutes a limitation upon the power of amendment and has nothing to do with a situation such as the one here presented. The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion.

Id. at 615-16.

expression and the related right of voters to have their views articulated for them in Congress.⁴⁵

The essence of representative government is the one speaking for the many; hence the rights of those who are to be represented must always be accorded high standing and any infringement must be carefully scrutinized. Nevertheless, we have seen that even this crucial right is hedged in by various restrictions which arise out of the Constitution itself. The same Constitution which guarantees the right to expression and the right to vote also limits the powers of courts.

The right to vote is not an academic right; its primary objective is frustrated when the person elected cannot assume the powers and responsibilities of office. Nevertheless, the subject matter of Mr. Powell's claim and the voting claims of the class Appellants are so interrelated that neither can be regarded as having an existence entirely independent of the other; in the context of this case, they stand or fall together. It must follow that as Mr. Powell's claims are inappropriate for judicial consideration, so also are those of the class Appellants.

Our conclusion that the subject matter of the suit is inappropriate for judicial consideration is not inconsistent with the conclusion of Judge Hart. *Powell v. McCormack*, 266 F. Supp. 354 (D. D.C. 1967). He found that the subject matter embraced a "political question" under *Baker* and relied on this to conclude that there was no jurisdiction but rather affords a basis for declining to exercise it. The decisions of the District Court and of this court both are bottomed on concepts of separation of powers.⁴⁶

⁴⁵ The germ of this concept can be found in the language of the Court in *Bond* that a legislator's speech is protected so that the people may hear from their legislator and "also so they may be represented in government debates by the person they have elected." *Bond v. Floyd*, *supra*, at 136-37. See also Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 254; Comment, 35 U. CHI. L. REV. 151, 170-72 (1967).

⁴⁶ As I read the concurring observations of my colleagues, a majority agrees on the essential holdings that (a) the court has jurisdiction, (b) the claims in this case are inappropriate for judicial consideration, and (c) a three-judge court was not required. *Baker* is definitive, it is recent, and it is authoritative; and there is no need to press beyond the new outer limits it establishes for jurisdiction, justiciability and political questions. I do not express a view as to whether exclusion may be accom-

PART III

THE SPEECH OR DEBATE CLAUSE

Appellees treat the Speech or Debate Clause under their argument on jurisdiction and urge that it bars any court from questioning Members of the House of Representatives, individually or collectively, with respect to legitimate legislative activities and that this includes the exercise of their constitutional responsibility to vote on the seating of a Member-elect. Treatment of this claim has been deferred because it is not entirely clear whether it goes to jurisdiction or some other bar to granting the relief sought. For our purposes we need not resolve that classification. Since two of the four Supreme Court holdings on the Clause are barely two years old the point commends itself to consideration.

The Clause confers personal immunity on each Member of the House but it is not strictly a personal right since its purpose is to protect the legislative process in our system of representative government. The broad sweep of the bar is suggested by what the Supreme Court said about a legislator's burdens of responding to and defending a suit growing out of his legislative activities in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951):

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for public good. . . . The privilege would be of little value if they could be subjected *to the cost and inconvenience and distractions of a trial* upon a conclusion of the pleader, or to the hazards of a judgment against them based on a jury's speculation as to motives. (Emphasis added.)

The language of Article I, section 6, clause 1 is simply that "for any Speech or Debate in either House they

plished for reasons outside section 2 criteria; nor do I rely on *the fact* that more than two-thirds of the House voted for Resolution 278 in its final form. The Speaker had made a ruling that a simple majority was sufficient and it is the essence of speculation to place any reliance on the quantum of the vote as actually cast. The Speaker ruled that Members were voting on exclusion, not on expulsion. The contention which merges exclusion and expulsion powers seems to me part of what is inappropriate for judicial consideration.

[Members] shall not be questioned in any other Place." That Clause had its genesis in the English Bill of Rights proclaimed by the Parliament of 1688-89.⁴⁷ The struggles arising in England were re-enacted in the American colonies where immunity for acts within the legislative chambers was asserted by the colonial lawmakers, see *JOURNALS OF THE HOUSE OF BURGESSSES OF VIRGINIA: 1727-1740*, at 242 (1910); see generally, M. CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 93-97 (1943). Indeed, the Supreme Court as recently as 1951 noted that "[f]reedom of speech and action in the legislature was taken as a matter of course by those who served the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, *supra*, at 372.⁴⁸

⁴⁷ "That the freedom of speech, and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament." 1 Will. & Mary s. 2, c. 2 (1689), reprinted in T. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 449, 451 (Plucknett ed. 1960).

The privilege of freedom of speech and debate was first included in the Speaker's petition to the King requesting certain Parliamentary privileges in 1541. An earlier indication of this privilege occurred during the reign of Richard II, when a member of Parliament who had introduced a bill containing reflections upon the King's extravagance was condemned to death. In a subsequent reign, the member's petition to annul the judgment on the ground that it was introduced and debated in Parliament was granted. C. WITKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 23-24 (1921).

As is pointed out in *United States v. Johnson*, 383 U.S. 169, 182-83 n. 13 (1966), language similar to that ultimately codified in 1688 was adopted in a statute of 1513, 4 Henry VIII, c. 8, as a result of the prosecution of Strode, a member of the House of Commons, for introducing certain mining legislation in which he had a personal interest. All of the early cases reveal a struggle between privilege and prerogative—between the King and Parliament or its members whom the King believed to be meddling in non-Parliamentary affairs. The struggle reached culmination in the prosecution of Eliot and other members of Commons for making seditious speeches and conspiring to restrain the Speaker from adjourning the session. The defendants pleaded Strode's Act but the court held it to be a private bill. *Eliot's Case*, 3 How. St. Tr. 294, 309 (1629). Thereafter, in 1667, Parliament declared Strode's Act to be a general law. See T. TASWELL-LANGMEAD, *supra*, at 246-50, 377-78.

⁴⁸ That the privilege was firmly embedded in English practice is revealed from Blackstone's writings:

For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their

So well known and accepted was this legislative immunity doctrine that the records of the Constitutional Convention show it was written into Article I without opposition or debate.⁴⁹ The objectives of the delegates can be gleaned from the writings of James Wilson, perhaps the most influential member of the Committee on Detail which drafted the provision for the convention:

In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense.

2 WORKS OF JAMES WILSON 421 (McCloskey ed. 1967).

The scope of the Clause has been challenged in the Supreme Court four times. First, in *Kilbourn v. Thompson*, 103 U.S. 168 (1880), the plaintiff, a recalcitrant witness before a House committee, was arrested and imprisoned by the Sergeant-at-Arms pursuant to a resolution of the House. The Supreme Court held that, although the imprisonment of Kilbourn was indeed unlawful, the Speech or Debate Clause constituted a bar to civil claims against the Speaker and the Members of the House, *id.* at 205.⁵⁰

own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti* It will be sufficient to observe that the whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere."

1 BLACKSTONE'S COMMENTARIES *163.

⁴⁹ The first notation of the Clause comes from a document in James Wilson's handwriting, considered by the Committee on Detail. 2 M. FARLAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 156 (rev. ed. 1966). Subsequent documents contain the first full expression of the Clause as it was reported to the convention and adopted. 2 *id.* at 166, 181, 246.

⁵⁰ The Court remanded the case as to the officers of the House, and plaintiff eventually recovered against them, *Kilbourn v. Thompson*, 11 Dist. Col. (MacArthur & Mackey) 401 (1883).

It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.

Id. at 204 (emphasis added).

Tenney v. Brandhove, 341 U.S. 367 (1951), was the second case to come before the Supreme Court on the Speech or Debate Clause. Brandhove was called to testify before a state legislative committee and when he refused to respond was held in contempt. The Supreme Court relied upon the general doctrine of legislative immunity, reflected in Article I, to insulate the members of the state legislature from suit. The opinion focused on the historical immunity of legislators from civil or criminal liability for their exercise of the privileges of speech and debate, within the sphere of legitimate legislative activity. *Id.* at 377-78.

In the third case to reach the Supreme Court, *United States v. Johnson*, 383 U.S. 169 (1966), a former Congressman challenged his conviction for violation of federal conflict of interest laws and conspiracy, asserting the immunities of the Clause. The conspiracy count was based in part on a speech delivered by him in the House, for which the Congressman was found to have received substantial sums of money claimed by the prosecution to be a bribe. The Fourth Circuit reversed and phrased the issue in terms of jurisdiction:

This is the first case, within our knowledge, squarely raising the question whether the congressional privilege deprives a court of jurisdiction to try a member on a criminal charge of accepting money to make a speech in the House of which he is a member.

337 F.2d at 180, 186 (4th Cir. 1964).

In affirming the Fourth Circuit the Supreme Court accepted the linkage of the Article I Clause with the English and Colonial precedents, characterizing its adoption into Article I as a culmination of the

History of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.

383 U.S. at 178. That the Clause must be "read broadly to effectuate its purposes," is made abundantly clear:

[T]he privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.

Id. at 181. The Supreme Court did not discuss the claim of Johnson in jurisdictional terms.⁵¹

The most recent of the four cases involving the Clause is *Dombrowski v. Eastland*, 387 U.S. 82 (1967). This court affirmed summary judgment for the defendants in a suit against a Senate Committee Chairman and its chief counsel for injunctive relief and damages flowing from an alleged conspiracy between the defendants and Louisiana state officials to seize property and records of the petitioners in vio-

⁵¹ The entire thrust of the opinion suggests that the holding rests on the fact that a criminal indictment charged a Member of the House with conduct basely motivated—"precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry," *United States v. Johnson*, 383 U.S. 169, 180 (1966). If Appellants' claims are read as asserting that the votes of the House Members were racially motivated it is clear that the Supreme Court views motives of legislators, however unworthy, as irrelevant. Mr. Justice Frankfurter's statement in *Brandhove* is sweeping:

The claim of an unworthy purpose does not destroy the [Speech or Debate] privilege. . . . The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U.S. 423, 455.

Tenney v. Brandhove, *supra*, at 377.

lation of their fourth amendment rights. *Dombrowski v. Burbank*, 123 U.S. App. D.C. 190, 358 F.2d 821 (1966) (per curiam). The Supreme Court affirmed as to the Committee Chairman. It reversed and ordered a new trial only as to the chief counsel:

It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881), that legislators engaged "in the sphere of legitimate legislative activity," *Tenney v. Brandhove*, *supra*, 341 U.S., at 376, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.

387 U.S. at 84-85 (emphasis added).

If the Members of the House who are Appellees here cannot be "questioned in any other Place," it would seem that they need not answer in any other place, including courts. From this it is arguable that had the class defendants elected to ignore the complaint, the District Court might have had an obligation to apply *sua sponte* the bar of the Clause; however, we need not decide that point.

Having in mind the breadth accorded the Clause in *Kilbourn*, *Tenney* and *Dombrowski*, and the "prophylactic purposes of the clause," *United States v. Johnson*, *supra*, at 182, it would seem that, however characterized, the Clause operates as a bar to the maintenance of this suit.⁵²

PART IV

THREE JUDGE COURT

In their complaint in the District Court, Appellants applied for the convening of a three-judge court pursuant to

⁵² In both *Kilbourn* and *Dombrowski* money damages were sought and officers of the House and Senate were held not to share the absolute immunity accorded Members. In the instant case Appellants seek, not money damages, but extraordinary coercive equitable relief against employees of the House directly contrary to commands of the House itself.

28 U.S.C. § 2282. (1964).⁵³ The District Court denied the application on the ground that a resolution of one House, such as House Resolution 278, excluding Appellant Powell from the House was not an "Act of Congress" within the meaning of the statute. *Powell v. McCormack*, 266 F. Supp. 354, 355 (D. D.C. 1967). Cf. *Krebs v. Ashbrook*, 275 F. Supp. 111, 118 (D. D.C. 1967).

The District Court's conclusion is amply supported by the plain meaning of "Act of Congress" as used in the statute and by the legislative history and purpose of section 2282. The decided cases demonstrate that

[t]he legislative history of § 2282 and of its complement, § 2281, requiring three judges to hear injunctive suits directed against federal and state legislation, respectively, indicates that these sections were enacted to prevent a federal judge from being able to paralyze totally the single operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963) (footnote omitted). See *Zemel v. Rusk*, 381 U.S. 1, 7, n.4 (1965); *Phillips v. United States*, 312 U.S. 246, 248-51 (1941). The legislative purpose is not served by construing the statute to cover the resolution in this case since the statute is to be construed narrowly. *Bailey v. Patterson*, 369 U.S. 31, 33 (1962). House Resolution 278 is a resolution of one House only and relates to the organization and internal governing of the House of Representatives. It creates no broad statutory scheme which would be frustrated by injunctive relief, and it does not contain the attributes of the usual "Act of Congress" which involves the House of Representatives, the Senate, and the President.⁵⁴

⁵³ Section 2282 provides: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

⁵⁴ Although there are no direct holdings in point, prior case law supports the District Court's conclusion. In *Krebs v. Ashbrook*, 275 F. Supp.

CONCLUSION

Our disposition of this appeal on the ground that the claims are nonjusticiable because of the inappropriateness of the subject matter for judicial consideration, makes it unnecessary to reach the claims on the merits. Nevertheless, some mention of the conflicting views is appropriate.

Debate on the scope and meaning of Article I, sections 2 and 5 began at Philadelphia and has engaged the attention of legal writers, including Members of both Houses, ever since. As with the debates over other issues arising under the Constitution, this debate has not been and possibly never will be judicially resolved. To vest in the members of a legislative body the powers intimated in the literal language of section 5 "to be the Judge" of matters as significant as the exclusion and expulsion of members plainly involves risks. Professor Chafee parades some of the horrendous possibilities which from time to time have been suggested:

If it [Congress] can add crime or disloyalty acts as bars, it can add profiteering as well. . . . A majority . . . can raise the minimum age to fifty . . . bar men of Jewish race, . . . require that members must be already enrolled in either the Republican or the Democratic Party, or recognize only a single party entitled to nominate candidates. There is no line to be drawn, once the legislature is allowed to cross the constitutional limits. It can turn our democracy into an oligarchy by imposing high property qualification, or into a dictatorship of the proletariat by declaring ineligible all persons deriving income from rents and invested capital.

111(D. D.C. 1967), Rule XI of the House of Representatives, the charter of the House Un-American Activities Committee, was held not to be an "Act of Congress" within the meaning of the statute. *Contra Stamler v. Willis*, 371 F.2d 413 (7th Cir. 1966).

Since we predicate our holding on the absence of an Act of Congress as required by the statute, we are not required to reach the alternative grounds suggested by Appellees, that even assuming that House Resolution 278 is an Act of Congress, a single district judge may dismiss the action for lack of federal jurisdiction. See *Lion Mfg. Co. v. Kennedy*, 117 U.S. App. D.C. 367, 330 F.2d 833 (1964); cf. *Reed Enterprises v. Corcoran*, 122 U.S. App. D.C. 387, 354 F.2d 519 (1965).

Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 255 (1942). But Professor Chafee acknowledges that there is much to be said for the view that requirements other than those of section 2 must be embraced in the less precise language of section 5 that each House is to be "Judge" of the qualifications of its Members. He concludes by saying that neither of the extreme views, i.e., no exclusion power except for section 2 reasons, or unrestricted exclusion powers, is sound and that the actual practice and usage has long taken an intermediate ground.

As to elected persons satisfying all the requirements in the Constitution, we are not forced to choose between giving the House absolute power to unseat whomever it dislikes, and giving the voters absolute power to seat whomever they elect. A third alternative has been adopted, fairly close to the second view. The constitutional qualifications ordinarily suffice; but Congress has rather cautiously imposed some additional tests by statute,¹⁵⁵ and the House of Representatives or the Senate has probably added a very few more qualifications by established usage (a sort of legislative common law) to cover certain obvious cases of unfitness.

Id. at 257.

Great reliance is placed by Appellants on the views of Professor Charles Warren, another constitutional writer. Professor Warren views section 2 as fixing the only qualifications for membership in the House. Referring to the Convention's refusal to adopt "the proposal to give Congress power to establish qualifications in general [or adopt] . . . the proposal for a property qualification," he concludes:

¹⁵⁵ Professor Chafee's reference to a "statute" is not followed by any citation. It may be that he had reference to a statute enacted in the Civil War period prescribing an oath of past loyalty, Act of July 2, 1862, ch. 128, 12 Stat. 502, or to a statute which forever renders a Senator, Representative, department head, or other officer of the government incapable of holding office under the United States if such person receives compensation for services in any matter in which the government is a party, Act of June 11, 1864, ch. 119, 13 Stat. 123; see *Burton v. United States*, 202 U.S. 344 (1906).

Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship, and residence. For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply.

C. WARREN, *THE MAKING OF THE CONSTITUTION* 421 (1937) (footnote omitted).

The protagonists for the conflicting views on the scope of exclusion powers of the House draw on the various aspects of history, custom and usage which support their respective positions.⁵⁶ Most of this, of course, is addressed to what are the merits of the claims asserted by Appellants. Reference to these unresolved constitutional questions is made in order to indicate their scope and nature and to underscore what it is that we do not decide.

⁵⁶ *E.g.*, Z. CHAFEE, *supra*, at 241-69; C. WARREN, *supra*, at 412-26; Wechsler, *supra*, at 8. Background historical material is set forth in 1 BLACKSTONE'S COMMENTARIES *162-63, *175-77; M. CLARKE, *supra*, at 174-205, 236-62; THE FEDERALIST No. 60, at 409 (Cooke ed. 1961) (Hamilton); J. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 171-204* (1963); C. WITKE, *supra*, at 55-74, 90-171. The relevant English cases, including the famous case of John Wilkes, are found in GLANVILLE, *REPORTS OF CERTAIN CASES DETERMINED AND ADJUDGED IN PARLIAMENT* (1776).

The instances in which the House of Representatives considered exclusions or expulsions are found in 1 A. HINDS, *PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* 381-591 (1907); 2 A. HINDS, *supra*, at 795-860; 6 C. CANNON, *PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* 50-63 (1935). See Hupman, *Senate Election, Expulsion and Censure Cases*, S. DOG. NO. 71, 87th Cong., 2d Sess. (1962); 1 H. REMICK, *supra*, at 116-332.

Conflicts between our co-equal federal branches are not merely unseemly but often destructive of important values. In the interpretation of provisions which are pregnant with such conflicts the unavailability of a remedy and the consequences of any unresolved confrontation between coordinate branches weigh heavily in pointing to a conclusion either that no jurisdiction was intended or that if jurisdiction exists it should not be exercised.

The checks and balances we boast of can check and balance just so far. The Framers had hard choices in many areas. To allow, for example, total immunity for speech, debate and votes in the Congress risked irreparable injury to innocent persons if false or scurrilous charges were made on the floor of a Chamber; to allow the Executive exclusive power of foreign relations risked unwise policies which could lead to war; to tolerate the essential supremacy of constitutional interpretation in a Supreme Court meant the risk of unwise decisions by a transient majority. But that is the way our system is constructed. Under stress what some may think are weaknesses turn out to be strengths and the wisdom of Framers in dividing the spheres of delegated power becomes clear.

That each branch may thus occasionally make errors for which there may be no effective remedy is one of the prices we pay for this independence, this separateness, of each co-equal branch and for the desired supremacy of each within its own assigned sphere. When the focus is on the particular acts of one branch, it is not difficult to conjure the parade of horrors which can flow from unreviewable power. Inevitably, in a case with large consequences and a paucity of legal precedents, the advocates tend to raise the spectre of the hypothetical situations which would be permitted by the result they oppose. Our history shows scant evidence that such dire predictions eventuate and the occasional departures in each branch have been thought more tolerable than any alternatives that would give any one branch domination over another. That courts encounter some problems of which they can supply no solution is not invariably an occasion for regret or concern; this is an essential limitation in a system of divided powers. That courts cannot *compel* the acts sought to be ordered in this case recedes into rela-

tive insignificance alongside the blow to representative government were they either so rash or so sure of their infallibility as to think they should command an elected co-equal branch in these circumstances.

We should resist the temptation to speculate whether and under what circumstances courts might find claims to a seat in Congress which would be justiciable. We do well to heed the admonition of Mr. Justice Miller, uttered nearly a century ago, that judges confine themselves to the case at hand:

It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate.

Kilbourn v. Thompson, supra, at 204-05.

The judgment appealed from is

Affirmed.

McGOWAN, *Circuit Judge, concurring separately*: My colleagues and I reach a common result, that is to say, (1) a three-judge court was not required for the reasons stated by Judge Burger, and (2) we do not think it either necessary or appropriate to direct the District Court to reinstate the complaint and to determine after trial whether the particular relief sought should be given. Because this second determination involves considerations peculiarly committed to judicial discretion, it is not surprising that, although our identification and weighing of relevant factors presents some overlap, each of us has preferred to characterize in his own words the route he has travelled.¹

This record demonstrates to me that, from the beginning, Representative Powell's view of the Constitution has explicitly and continuously been that, so long as he possesses the requisite qualifications of age, citizenship, and inhabitancy, his right to serve in the House is solely a matter between him and his constituents, not his colleagues. If the voters of his district do not like his conduct in office, they can turn him out at the next election; or, if that conduct be thought violative of the criminal laws, the proper authorities can seek indictments. But, so his reasoning proceeds, for his colleagues to make that conduct the occasion for severance of their association together in the House would be, without observance of the amending process, to add further qualification requirements to the three now stated in the Constitution.

Thus it was that, although the Select Committee expressly informed him that the scope of its inquiry included both (1) his qualifications in terms of age, citizenship, and inhabitancy, and (2) alleged misconduct in office warranting expulsion or other punishment, he persistently refused to answer any questions or supply any information except with respect to (1). Somewhat belatedly, he sought to

¹ For example, the allegedly exclusive power of the House to pass upon the fitness of a member, and the claimed reach of the Speech and Debate Clause, have played no part whatsoever in my vote. I do not profess to know what their precise constitutional meaning is, nor do I say that they are wholly without relevance to a discretionary declination of jurisdiction. I simply have not found it necessary to take them into account in my determination.

fortify his legal position by asserting that the Committee could, at most, take up (2) only after he had been seated, even though he was at the moment of that claim continuing to receive full pay and other allowances and emoluments. But there is no reason to think that, had the Committee deferred the second aspect of its inquiry until after seating, his basic constitutional position would have been abandoned.

In the context of the kind of misconduct in office involved here,² I regard that position as untenable. In saying this, I distinguish very sharply between conduct abusing the privileges of House membership, on the one hand, and status or speech, on the other. If the House were to withhold recognition of a member because of his race, or religion, or political or philosophical views, there would indeed have been an addition to qualifications without benefit of constitutional amendment. But the allegations in the complaint which suggest that this is such a case are so purely conclusory in character as, under elemental pleading concepts, not to require a hearing on the merits.

Appellant Powell's cause of action for a judicially compelled seating thus boils down, in my view, to the narrow issue of whether a member found by his colleagues, after notice and opportunity for hearing, to have engaged in official misconduct must, because of the accidents of timing, be formally admitted before he can be either investigated or expelled. The sponsor of the motion to exclude stated on the floor that he was proceeding on the theory that the power to expel included the power to exclude, provided a 2/3 vote was forthcoming. It was.³ Therefore, success for

² It is argued that the misconduct cannot be assumed because Powell was denied procedural due process by his colleagues in the investigation of his activities. But no one can read the record of the Select Committee's relationships with Powell without concluding that there was no serious purpose upon Powell's part to participate in the ascertainment of the facts. This was unquestionably due to his fundamental constitutional theory that he was accountable for his conduct only to his constituents. One cannot escape the impression that any procedural problems would have been resolved satisfactorily if there had been willingness to accept the relevance of the alleged misconduct to his continuance in the House. Against this background, I see no need to reinstate the complaint solely to pursue the procedural issues.

³ It is true that the Speaker, after inquiry to the Parliamentarian, announced that the motion would carry on a majority vote. All this sug-

Mr. Powell on the merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade.

Our already overtaxed courts arguably have more pressing work to do than this, including the hearing and determination of serious and substantial claims of deprivations of civil rights. The only question really presented by this complaint is whether the House must go through the formality of seating a member before it expels him for official misconduct. Unlike the District Court, I am prepared to say that even such a narrow issue confers subject-matter jurisdiction in the familiar sense of (a) a claim arising under the Constitution, (b) a case or controversy, and (c) a statute founding jurisdiction. But the Supreme Court in *Baker v. Carr* was at pains to make clear that the *existence* of jurisdiction does not invariably require its *exercise*. The question is one of whether, under all the circumstances and with a wise regard for the nature and capabilities of judicial power and for the respect it must always command, the court is bound to hear and determine a complaint on its merits.⁴

gests to me is that, in this instance, Representative Curtis was a better parliamentarian than the Parliamentarian. In any event, the result conformed to the more exacting standard; and for me to guess whether the result would have been different if the Speaker's ruling had been different would be to engage in the speculation Judge Burger deprecates (fn. 46).

As to Judge Burger's implication that I have gotten into the merits, I note only that he, having decided that the words of the Constitution vest in the House the power to judge a member's fitness, concludes that jurisdiction may be declined to review its exercise in this instance. I having read the text of the Constitution as declaring a power in the House to expel a member for misconduct in office by a 2/3 vote, conclude that jurisdiction may be declined to pursue the narrower question of whether the Constitution requires that the House must first seat before it expels. It would appear that each of us has, preliminarily to concluding whether jurisdiction must be exercised, gone no further in deciding questions of "textual commitment" than is contemplated by the majority opinion in *Baker v. Carr*.

⁴ The factors that are relevant to this kind of a determination obviously include the nature of the relief sought in this case, injunction, mandamus, and declaratory judgment. All have traditionally been regarded as reposing peculiarly in the discretion of the court and as subject to denial, even after hearing on the merits, for reasons unrelated to the merits. The potential embarrassments and confusions, both within the

The challenged action by the House in this case reflects in substance an equation by it of its power to expel for legislative misconduct by a 2/3 vote with a power to deny seating for the same reason and by the same vote. That action was rooted in the judgment of the House as to what was necessary or appropriate for it to do to assure the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government. That is a judgment which, on this record, presents no impelling occasion for judicial scrutiny.

House and between it and the judicial and executive branches, inevitable upon their grant in this case are worthy of sober remark. These and like matters are legitimately the setting in which are to be considered the urgencies, in terms of simple justice, of the bringing to bear of judicial power.

LEVENTHAL, *Circuit Judge*: I concur in the result. Judge Burger's opinion presents the background of this case in detail. I agree with some aspects of his opinion—particularly the conclusions in Part I and Part IV. As to other aspects, I am either in disagreement or find it unnecessary to define my position. It would unduly protract and delay our disposition for me to make a point by point analysis. Accordingly I confine myself at this time to a relatively sparse, almost topic-sentence, statement of my approach, as follows:

1. The complaint on its face presents a matter within the subject-matter jurisdiction of the District Court. It alleges a claim arising under the Constitution, there is a case or controversy, and there exists a Federal statute giving district courts jurisdiction to consider such a case, namely, 28 U.S.C. § 1331. The fact that this is a novel law suit does not negative jurisdiction. *Baker v. Carr*, 369 U.S. 186 (1962).

2. I do not feel required to decide appellees' contention that the case lacks justiciability, a concept that I think was developed in *Baker v. Carr* as defining the kind of case or issue that is inherently inappropriate for determination by any court.

For example, I am not prepared to say at this juncture that a complainant charging an unconstitutional exclusion from Congress avowedly put on racial or religious grounds cannot obtain a declaratory judgment or other relief. Nor do I consider whether appellant Powell may have available other judicial remedies.

3. In my view the issue presented by the complaint is of such a nature that dismissal is appropriate in the exercise of sound judicial discretion.

Plaintiffs were seeking remedies—mandamus; equity decree; declaratory judgment—each of which is not necessarily automatically available to one asserting (and even establishing) the underlying right. In an action seeking such remedies a court has discretion in deciding whether, when and how far to consider the merits.¹

¹ See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962).

4. For present purposes I assume appellants are correct in their assertion that Article I, Section 5, Cl. 1 of the Constitution is exclusive in stating conditions of eligibility for Congressmen. But that does not mean that appellant Powell was immune from exclusion on grounds that would justify expulsion under Article I, Section 5, Cl. 2.

The record before us shows that the exclusion by the House of appellant Powell was by a vote of 307 to 116, on a motion put forward by its sponsor, Congressman Thomas Curtis of Missouri, on the ground that Mr. Powell's conduct was such as to warrant his expulsion under Article I, Section 5, Cl. 2 of the Constitution if he were seated, and that he should therefore be excluded at the outset.

Certainly members of the House, who cannot be questioned in court for action taken within a "sphere of legitimate legislative activity,"² can, without being subject to court disapproval, expel a member they find to have misused travel credit cards, and kept on his payroll a person (his wife) who resided neither in his District nor in the District of Columbia. The fact that the House is not a court, with power to enter a judgment of conviction for violation of laws, does not preclude it from concluding that the pertinent acts were committed by the Congressman, as a part of an ultimate determination of lack of fitness for service in the House, a determination entrusted to the House by Article 1, Section 5, Clause 2 of the Constitution.

² *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), quoted in *Domkowski v. Eastland*, 387 U.S. 82, 84, 85 (1967), confirms the principle inherent in separation of powers that such action is not subject to judicial scrutiny or cognizance.

Compare the rule establishing immunity from suit of judges of courts of general jurisdiction, considered a fundamental requirement of an independent judiciary. *Bradley v. Fisher*, 12 Wall. (80 U.S.) 335, 351 (1871), holds that such judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." The Court also stated (pp. 351-52): "Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." In *Pierson v. Ray*, 386 U.S. 547, 554 (1967) the Court referred with approval to *Bradley v. Fisher*, and referred to the historic immunities of judges and legislators as "equally well established."

5. Appellant Powell seems to have been of the view that whatever grounds the House may have had to expel him once he was seated, they could not be used as grounds to exclude him without seating him.

On this point I think that in a case like Powell's where the record (including reports of legislative committees) provides abundant indication that there was at least a substantial question of misconduct in Congressional office, the view of Congressman Curtis was permissible under the Constitution, and appellants' contention to the contrary must be rejected.

As to the interim period, I am at least reassured by the provision in H. R. Res. 1 of the 90th Congress, 1st Sess., adopted after debate in which Mr. Powell participated, that pending the investigation and report by the Select Committee and House action thereon Mr. Powell was to receive the pay, allowances and emoluments authorized for Members of the House, though he was not to be sworn in or occupy a seat in the House.

As to the right of the other appellants to be represented during the interim period, they stand on no higher ground than the claim of appellant Powell to be seated.*

Appellants say in rebuttal, *inter alia*, that the theory advanced by Congressman Curtis is not available to appellees since the House did not accept the need for a $\frac{2}{3}$ vote, which Mr. Curtis recognized as essential. The Speaker announced, on a parliamentary inquiry, that only a majority vote was required for exclusion of appellant Powell.

This contention is not without force. But assuming, *arguendo*, that the procedure used to exclude Powell may have been improper that does not mean he is entitled to maintain an action for discretionary relief of a nature that brings a court close to confrontation with members of the coordinate legislative branch of government. Thus, a court

* See *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 616 (1929): "The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power and no more deprives the state of its 'equal suffrage' in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion."

may decline to entertain an action based on such a procedural defect unless it appears not only that the defect may have been prejudicial but also that it probably was prejudicial, at least where as here the relief sought is extraordinary.

6. The fact that the House voted exclusion by a $\frac{2}{3}$ vote is not irrelevant, even assuming the majority ground rule was improper, for it at least generates a substantial doubt that a court declaration would provide Powell his seat—even assuming as I think we should, that the House would respect the court's declaratory judgment. Compare *Bond v. Floyd*, 385 U.S. 116 (1966). The House could immediately exclude on the same ground, by the same vote.

True, the House could do this, by hypothesis, only if the "ground rule" were that a $\frac{2}{3}$ vote was necessary. But it does not appear that appellant Powell ever staked his position on the need for a $\frac{2}{3}$ ground rule.

7. It is significant that appellant Powell, though duly re-elected in April 1967, has not availed himself of the legislative remedy available with this re-election to assert his claim to represent his district.

On the argument for stay Powell's counsel indicated that at least one reason, and apparently a major reason, why appellant Powell did not invoke that legislative remedy is that it would not maintain his seniority and chairmanship. Perhaps so, but a court would be going to the extreme edge of its authority if it were to declare his status as a Congressman. It cannot reasonably be asked to provide such extraordinary relief to enable complainant to obtain perquisites, however important, that are essentially a matter for legislative determination, and certainly are not assured by any constitutional clause. A court has a duty, in the sound exercise of discretion, to consider litigation seeking relief that raises problems of confrontation with a coordinate branch with an approach that will, wherever possible, confine relief narrowly.

8. If Powell had acquiesced in the premise that there was authority to exclude, but only by a $\frac{2}{3}$ vote and $\frac{2}{3}$ ground rule, there would likely have been a very different kind of legislative situation. He could not consistently have stood on the position that the House and its Select Committee

were acting beyond the proper sphere of authority by considering matters other than age, citizenship and residence. He may have been unwilling to wage battle even on a $\frac{2}{3}$ ground rule after a hearing that admittedly was warranted in inquiring into various financial and salary arrangements. The premise of permissible exclusion would have undercut the position that permitted him to defer as a matter of principle any explanation of those arrangements.

9. The various objections lodged by appellant Powell to the procedure of the House Committee must all be viewed in the light of his then position that the Committee's scope was restricted to the three issues of age, citizenship and residence. It cannot be assumed that procedural differences would have loomed as large, or been unmanageable, if appellant Powell had accepted what I think was a valid premise of the House and its Committee. That premise—which I uphold by a ruling on the merits on this issue—is that the Constitution gives the House legislative “jurisdiction,” even prior to seating a member-designate, to make inquiry as to whether he has committed acts justifying punishment or expulsion of a member.

10. My approach may not hang tidily on the pegs of jurisprudence thus far called to my attention. It makes sense to me, however, and labels and concepts can emerge in due course.

What seems to have received most discussion in recent years is the concept of justiciability as a requirement in addition to subject-matter jurisdiction. As I read them the discussions of justiciability and non-justiciability have emerged primarily in terms of whether the issue is of a kind that lies within any province of any court at any time. I refrain from accepting absolutes about the case before us—to lay it down flatly either that no court may consider the issue and rule differently from the House, or that there may not be a state of facts that would properly call upon the District Court to grant declaratory and perhaps other relief. There are recent decisions indicating that when there is a determination of both subject-matter jurisdiction and justiciability for the issues, the courts are required to decide the issues and to vindicate the applicant's constitutional rights

—to refrain from sidestepping this duty merely because the framing of judicial relief presents large difficulties,⁴ and to take cognizance of a case seeking declaratory relief even where an injunction cannot properly be obtained.⁵ By strict logic the same approach should apply when there is a hypothesis of justiciability or at least a disinclination to enter a ruling of non-justiciability. Yet there have been instances when the courts have bypassed crucial jurisdictional issues and disposed of cases on the merits.⁶ I think the spirit of those cases also justifies the course I follow—of deciding the merits on one key point and yet refraining, in the exercise of discretion, a full adjudication on the merits.

The key point, to me, is that Congressman Powell erred in his assumption that his satisfaction of the Constitutional requirements (of residence, citizenship and age) meant that he had to be seated, and that grounds justifying expulsion could only be applied to those who had already been seated. My ruling on the merits of this Constitutional issue leads to the conclusion that the House had legislative jurisdiction to consider and appraise the activities and fitness of appellant Powell at the time he presented his credentials. It is not a full adjudication of the merits of the claim of appellant Powell that he was wronged. It does not necessarily mean either that the House acted properly when it failed to heed the ground rule of a $\frac{2}{3}$ vote put forward by Congressman Curtis as the assumption of his motion to exclude, or that a court considering a different prayer for relief would be disabled from saying so upon a full consideration of Powell's case on its merits.

The case before us presents problems of confrontation with a coordinate branch and of molding relief. These are considerations that lead a court in some instances to find non-justiciability of the issue for any court.⁷ They may also properly be invoked, I think, as backdrop and perspective

⁴ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁵ *Zwickler v. Koota*, 389 U.S. 241 (1967).

⁶ *See, e.g., Secretary of Agriculture v. Central Biog Ref. Co.*, 338 U.S. 604, 619-20 (1950); *Ex Parte Bakelite Corp.*, 279 U.S. 438, 448 (1929).

⁷ *Baker v. Carr*, 369 U.S. 186 (1962).

for a ruling to decline to provide a full adjudication on the merits, even assuming justiciability. My reasoning is that the confrontations would likely have evolved in a quite different way if appellant Powell had recognized a power to exclude on grounds of misconduct (albeit on $\frac{2}{3}$ vote) and had conducted himself on this premise from the start. Hence I do not think it mandatory for a court to consider and determine the constitutional issue as he has chosen to frame it, from an erroneous premise; and specifically, I think it proper to refrain from a full determination of the merits in a case where petitioner is seeking an extraordinary remedy yet has failed to invoke to the fullest extent the remedies and procedures available within the legislative branch.

Filed July 30, 1968. Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 20,897

September Term, 1967.

ADAM CLAYTON POWELL, JR., et al., *Appellants*,

v.

JOHN McCORMACK, Speaker of the House of
Representatives, et al., *Appellees*

Before: Burger, Circuit Judge, in Chambers.

ORDER

It is ordered, *sua sponte*, that the opinion filed herein on February 28, 1968, is amended as follows:

On Page 2, line 2, delete the fourth word "of".

On Page 19, line 8, change "will present" to "presents".

On Page 25, line 11, add "the Constitution" after "arises under".

On Page 28, lines 10-11, change these lines to read: "characterized his role as partly a diplomatic resident of a 'foreign' state and partly a territorial delegate to Con-"

On Page 28, line 31, add a comma after "then" before "culmi-"

On Page 28, last line, insert "to appear" after "refused".

On Page 32, omit the last sentence of the carry-over paragraph, the sentence that begins "assuming that . . ."

On Page 41, line 12, replace "commends itself to consideration" with "merits some comment."

On Page 43, next to the last line, replace "challenged in" with "considered by".

On Page 45, line 6, before "phrased" insert "Chief Judge Sobeloff".

On Page 47, lines 4-5, change these to read: "182, it would seem, although we need not decide, that, however characterized, the Clause would operate as a bar to the maintenance of this suit.⁵²"

On Page 52, line 13, change "could" to "might".

On Page 52, line 20, omit "thus".

On Page 53, line 1, replace "acts sought to be ordered" with "acts Appellants would have us order".

On Page 53, line 3, replace "they" with "judges".

Filed Feb. 28, 1968. Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA DISTRICT

No. 20,897

September Term, 1967.

Civil 559-67

ADAM CLAYTON POWELL, JR., et al., *Appellants*,

v.

JOHN W. McCORMACK, Speaker of the House of
Representatives, et al., *Appellees*

Appeal from the United States District Court for the
District of Columbia.

Before: Burger, McGowan and Leventhal, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof it is order and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby affirmed.

Per Circuit JUDGE BURGER.

Dated: February 28, 1968.

Separate concurring opinion by Circuit Judge McGowan.

Separate opinion by Circuit Judge Leventhal concurring in the result.

Filed Dec. 2, 1968. Nathan J. Paulson, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA DISTRICT

No. 20897

ADAM CLAYTON POWELL, JR., et al., *Appellants*,

v.

JOHN MCCORMACK, et al., *Appellees*.

STIPULATION DESIGNATING SUPPLEMENTAL PORTIONS OF
RECORD

The Clerk will please prepare, for transmission to the Clerk of the Supreme Court of the United States for use in *Powell v. McCormack*, No. 138, O.T. 1968, the following additional portions of the record in this Court:

1. Docket entries in 20897, United States Court of Appeals for the District of Columbia Circuit;
2. Letter of April 24, 1967, from the clerk to counsel regarding preparation for argument;
3. Appellants' Motion with respect to Order of the Court dated April 27th (filed May 4, 1967);
4. Appellees' Response to Motion with respect to Order of the Court of April 27th (filed May 9, 1967);
5. Per Curiam Order dated May 10, 1967, regarding provisions of the Order of April 27, 1967, etc.;
6. Appellants' Motion to File Petition for Writ of Certiorari in Lieu of Brief Pursuant to Order of May 10, 1967 (filed June 2, 1967);
7. Appellees' Memorandum with respect to Appellants' Motion to File Petition for Writ of Certiorari in Lieu of Brief (filed June 9, 1967);
8. Per Curiam Order of the Court dated June 19, 1967;
9. Appellants' Motion for Leave to File, Time Having Expired, Motion for Extension of Time to File Brief (filed June 21, 1967);
10. Order entered June 27, 1967;
11. Appellants' Motion for Leave to File Brief, Time Having Expired (filed July 10, 1967);

12. Order entered July 12, 1967;
13. Letter from counsel designating record for use on certiorari filed May 28, 1968; and
14. Order per Judge Burger amending Opinion filed on February 28, 1968 (filed July 30, 1968).
15. This designation.
16. Clerk's certificate.

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(6108-5)

MAY 28 1968

Supreme Court of the United States

JOHN F. DAWES, CLERK

OCTOBER TERM, 1968

No. [REDACTED]

138

ADAM CLAYTON POWELL, JR., et al.,

Plaintiffs-Petitioners,

—against—

JOHN W. MCCORMACK, et al.,

Defendants-Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

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10 Geo. Wash. L. Rev. 625 (1941)	23
36 Ill. L. Rev. 475 (1941)	23
40 Mich. L. Rev. 460 (1941)	23

Supreme Court of the United States

OCTOBER TERM, 1967

No.

ADAM CLAYTON POWELL, JR., *et al.*,

Plaintiffs-Petitioners,

—against—

JOHN W. MCCORMACK, *et al.*,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

*To the Justices of the Supreme Court
of the United States:*

Petitioners respectfully pray that a writ of certiorari issue to review the order and judgment of the United States District Court for the District of Columbia denying petitioners' application for the certification of the necessity of a statutory three-judge court, dismissing petitioners' complaint for want of jurisdiction of the subject matter, and denying petitioners' motion for a preliminary injunction, which order and judgment were affirmed by the United States Court of Appeals for the District of Columbia Circuit on February 28, 1968.

Opinions Below

The District Court, Hart, U.S.D.J., denying an application for certification of the necessity of a statutory three-judge court, dismissed the complaint for want of jurisdiction of the subject matter and denied a motion for preliminary injunction. Its opinion, which is reported at 266 F. Supp. 354, appears as Appendix A. The opinion-decision of the Court of Appeals, as yet unreported, appears as Appendix B, which is appended hereto.

Jurisdiction

The order and judgment of the District Court was entered on April 7, 1967. The opinion-decision of the Court of Appeals was issued and entered on February 28, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Statute Involved

HOUSE RESOLUTION 278

IN THE HOUSE OF REPRESENTATIVES
approved March 1, 1967.

RESOLUTION

WHEREAS,

The Select Committee appointed Pursuant to H. Res. 1 (90th Congress) has reached the following conclusions;

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964 to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D. C. or the State of New York as required by law.

Fourth, as Chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member; Now, therefore, be it

Resolved, That said Adam Clayton Powell, Member-Elect from the Eighteenth District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress, and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.

Questions Presented

1. Whether the refusal of the House of Representatives to seat a duly elected Representative of the people, who meets all the constitutional qualifications for membership in the House, and further to bar him from membership for the entire 90th Session violates the Constitution of the United States, and in particular Article One, Clause Two, and Article One, Clause Five, thereof.

2. Whether the refusal of the House of Representatives to seat a duly elected Representative of the people, who meets all the constitutional qualifications for membership in the House violates the fundamental and inalienable rights of the class of Petitioners, citizens of the 18th Congressional District of New York to the free choice of their own representatives to the Legislature essential to a system of representative democracy?

3. Whether the legislative punishment inflicted upon the Petitioner by the enactment of House Resolution 278 violated the Constitutional prohibition against Bills of Attainder?

4. Whether the punishment by exclusion of the Petitioner from membership in the House violated the Due Process guarantee of the Fifth Amendment to the Constitution of the United States.

5. Whether the exclusion of the Petitioner violated his rights and the rights of the class of Petitioners representing the overwhelming Negro majority of the citizens of the 18th Congressional District of New York guaranteed to them by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States?

6. Whether the dismissal of the complaint for "want of jurisdiction over the subject matter" was erroneous and in violation of Article III of the Constitution of the United States?

7. Whether the questions presented in the complaint are justiciable and subject to review by the national courts?

8. Whether the courts have power to grant the relief required to remedy the violations of Petitioners' rights?

9. Whether the District Court erred in refusing to certify the necessity for a three-judge statutory district court and, if so, whether this Court should order the convening of such a court and instruct such court to grant forthwith the relief prayed for herein?

Statement of the Case

The bedrock constitutional questions raised in this Petition, arise out of the extraordinary, arbitrary, and unconstitutional action of the majority of the House of Representatives on March 1, 1967, in excluding Adam Clayton Powell, Jr., the duly elected Member-elect from the 18th Congressional District of New York, possessing all requisite constitutional qualifications for membership in that body, and, further permanently barring him from membership in the entire 90th Session of the House. Because many of the relevant facts relating thereto have been of necessity incorporated in the legal arguments hereinafter set forth, Petitioners will here confine themselves to a recital of the basic uncontested facts leading up to the House's extraordinary unconstitutional action which has resulted in a crisis decisive to the future of representative democracy in this country.

Statement of Facts

1. The facts preceding the institution of the present action

Petitioner Adam Clayton Powell, Jr., the duly nominated Democratic candidate for the House of Representatives for the 18th Congressional District of New York, received the greatest number of votes cast for that office at the general election of November 8, 1966. The official tabulation of said votes, as certified by the Secretary of State of the State of New York, was as follows:

Lassen L. Walsh (Rep)	10,711
Adam C. Powell (Dem)	45,308
Richard Prideaux (Lib)	3,954
Rylan E. D. Chase (Con)	1,214

Based upon said tabulation, a certificate of election was issued by the Secretary of State on December 15, 1966, and duly forwarded to and received by the Clerk of the House of Representatives.

The 90th Congress opened on January 10, 1967, after respondent McCormack had been elected as the Speaker of the House of Representatives and duly sworn pursuant to the provisions of Title 2, U.S. Code, Section 25. He informed the House that he would, pursuant to the said Section 25, administer the oath to the Members-elect thereof. Prior to said administration, however, Representative Van Deerlin, of California, asked that Congressman Powell stand aside during the administration of said oath, which request, because of its status as a point of the highest personal privilege, was granted by the Speaker. After the other Members-elect had been sworn, a resolution, herein-

after referred to as House Resolution 1, was introduced and passed. House Resolution 1 reads in pertinent part, as follows:

Resolved, That the question of the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House to be appointed by the Speaker, four of whom shall be Members of the minority party appointed after consultation with the minority leader. Until such committee shall report upon and the House shall decide such question and right, the said Adam Clayton Powell shall not be sworn in or permitted to occupy a seat in this House.

Subsequently, and on January 19, 1967, the Speaker, pursuant to the provisions of the aforesaid resolution, appointed five Democrats and four Republicans, all lawyers, to serve as members of said select committee under the chairmanship of the Honorable Emanuel Celler, the Chairman of the House Judiciary Committee. On February 1, 1967, Mr. Celler, at the direction of the Select Committee, invited Member-Elect Powell to appear before it "to give testimony and to respond to interrogation" concerning his age, citizenship and inhabitancy and certain other matters.

The attorneys for Petitioner Powell filed several motions and supporting memoranda before, during, and after hearings held by the Select Committee on February 8, 14 and 16, 1967, all raising the issue of the denial to him of both substantive and procedural due process by the Committee's proceeding to consider the matter of seating or expelling him without the minimum due process requirements of an adversary hearing.

These motions and memoranda objected to: 1) the absence of any guides or standard by which alleged misconduct would be measured; 2) the absence of any charges and specification of violation of ascertainable proscribed conduct; 3) the absence of any of the procedural safeguards of an adversary hearing—such as a statement of charges, the right of confrontation, the right of cross-examination and the right of counsel in an adversary proceeding.

The total effect of these deprivations of due process was to deny to the individual and class plaintiffs-petitioners fundamentally protected constitutional rights without any of the traditional safeguards of an adversary proceeding, although the resulting recommendations included, for example, one that "Adam Clayton Powell, *as punishment*, pay the Clerk of the House, to be disposed of by him according to law, \$40,000." (Emphasis added.)

Petitioner Powell, accompanied by counsel, appeared before the Select Committee on February 8, 1967, and, after certain preliminaries which were made part of the record, the Committee received a brief and heard argument by counsel for him on the principal substantive motion submitted; received, but refused to entertain argument on his procedural motions, and took all of the motions—which the Chairman initially characterized as "dilatatory"¹—under advisement. The Chairman, over the protest of Petitioner Powell's counsel as well as one member of the Committee, then insisted that he, Powell, take the oath and be interrogated by counsel for the Committee. The interrogation began and was interrupted shortly thereafter by the ob-

¹ He later withdrew this categorization.

jection of Petitioner Powell's attorneys and their insistence that he would not proceed further without a ruling upon his pending motions. Thereupon, the Committee recessed and, upon reconvening, the Chairman denied all of the motions.

Petitioner Powell, under protest, thereupon proceeded to be interrogated by counsel for the Committee but limited his testimony, upon the advice of counsel, to the constitutionally prescribed qualifications of age, citizenship and inhabitancy. Counsel for Petitioner Powell then submitted and the Committee received documentary evidence as to those issues. The Chairman thereupon refused to permit Mr. Powell, as previously promised, to make a statement at that time.

Petitioner Powell, under the circumstances, did not again appear personally before the Committee. However, the Committee, under date of February 10, 1967, informed him that it would appreciate receiving certain information from him or his counsel, as follows:

"One: With reference to the seating phase of our inquiry, do you refuse to give any testimony concerning (a) status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico with particular reference to the instances in which you have been held in contempt of court, and (b) alleged official misconduct on your part occurring at any time since January 3, 1961?

Two: With reference to the second phase of our inquiry, relating to the power of the House to punish or expel pursuant to Article I, Section 5, Clause 2 of the Constitution, do you refuse to give any testimony concerning (a) status of legal proceedings in which you are a party of the State of New York and in the

Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court, and (b) alleged official misconduct on your part occurring at any time since January 3, 1961!"

On February 14, 1967, counsel for Mr. Powell appeared before the Committee and responded fully to its request for information, and indicated as follows:

"The short of our position is that H.R. No. 1 authorizes inquiry solely and exclusively into Congressman Powell's qualifications for membership in the House. If we are in error in that regard, then we take the flat position that the House could not, pursuant to H.R. No. 1, or indeed pursuant to any resolution, authorize any Committee to make the kind of simultaneous inquiry which this Committee proposes to undertake. Before the power to punish a 'member', pursuant to Article I, Section 5, Clause 2 of the Constitution can be invoked, the determination of membership must have been concluded on the basis of qualifications for membership as set forth in Article I, Section 2, Clause 2 of the Constitution."

Thereafter, the Committee held further hearings and received evidence, culminating in its Report, in which, while finding that

"Member-Elect Adam Clayton Powell meets the qualifications of age, citizenship, and inhabitancy and holds a certificate of election from the State of New York,"

it concluded that certain conduct of Mr. Powell "has reflected adversely on the integrity and reputation of the House and its Members." Among other things, it recommended that Mr. Powell be seated, be "censured and con-

demned", pay \$40,000 to the Clerk of the House by \$1,000-a-month deductions from his salary, and lose his seniority.

On March 1, 1967, the House of Representatives, upon presentation to it of the said Committee Report, including the recommended resolution, rejected the resolution as proposed by the Committee and instead adopted House Resolution 278.²

2. The initiation of the complaint

The present action, which was brought by Congressman Powell and thirteen of his constituents, as class representative of the electors of the 18th Congressional District, was instituted by the filing and service of a complaint seeking declaratory and injunctive relief and relief in the nature of mandamus, on March 8, 1967. The defendants named therein are the Speaker of the House of Representatives, five other members thereof, and the Clerk, the Sergeant-at-Arms and the Doorkeepers. The Member-defendants are sued individually and as representative of the class of Members, while the non-Member defendants are sued individually and in their respective capacities as agents or employees of the House of Representatives.

The complaint alleged that House Resolution 278 violated Article I, Section 2, Clause 2 of the Constitution of the United States in that it prescribed qualifications for membership in the House of Representatives other than those established therein. The complaint further alleged that the enactment of House Resolution 278, as to all non-

² "RESOLVED, That said Adam Clayton Powell, Member-elect from the 18th District of the State of New York be, and the same hereby is excluded from membership in the 90th Congress and that the Speaker shall notify the Governor of the State of New York of the existing vacancy."

white electors of the 18th Congressional District of New York, violated the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States. The complaint further alleged that as to the female electors of the 18th Congressional District of New York, the enactment of House Resolution 278 violated the Nineteenth Amendment to the Constitution of the United States.

The complaint further alleged that insofar as Member-Elect Powell is concerned, House Resolution 278 constitutes a bill of attainder and an *ex post facto* law, in violation of Article I, Section 9 of the Constitution and inflicts cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution of the United States. Finally, the complaint further alleged that the hearings before the select committee, as well as House Resolution 278 and the debate thereon, denied Congressman Powell his fundamental rights of due process of law, in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

B. Proceedings below

1) Proceedings in the District Court

After the filing and service of the complaint upon respondents, an application for the certification of the necessity of convening a three-judge court pursuant to 28 U.S.C. 2282 and 2284, and a motion for a preliminary injunction came on before the United States District Court for the District of Columbia on April 4, 1967. In addition to opposing Petitioners' application for the certification of the necessity of convening a three-judge court and their motion for interim injunctive relief, respondents moved to dismiss the action for lack of jurisdiction generally on the grounds that:

(a) the District Court did not have jurisdiction over the subject matter of the action;

(b) the District Court did not have jurisdiction over the persons of the respondents; and

(c) the complaint failed to state a cause of action upon which relief could be granted.

On April 7, 1967, the District Court issued an order (i) denying the application for the certification of the necessity of three-judge court; (ii) dismissed the complaint for want of jurisdiction over the subject matter; and (iii) denying the motion for a preliminary injunction. In so doing the Court bottomed its decision on what it considered the doctrine of separation of powers. As it stated:

"It is the conclusion of this Court that for the Court to decide this case on the merits and to grant any of the relief prayed for in the complaint would constitute a clear violation of the doctrine of separation of powers. For this Court to order any Member of the House of Representatives of the United States, any officer of the House, or any employee of the House to do or not to do an act related to the organization or membership of that House, would be for the Court to crash through a political thicket into political quicksand.

"This Court holds, therefore, that by reason of the doctrine of separation of powers, this Court has no jurisdiction in this matter."

At the same time the District Court entered its order denying the application for a statutory three-judge court and for preliminary injunction and granting the motion to dismiss the complaint for want of jurisdiction of the subject matter. A notice of appeal from the aforesaid order was duly and immediately filed, on April 7, 1967.

2) *Proceedings in the United States Court of Appeals
for the District of Columbia Circuit*

On April 9, 1967, Petitioners moved in the Court of Appeals for a summary reversal of the order and judgment of the District Court, a dispensation of the requirement for the filing of briefs and an immediate hearing thereon. On April 10, 1967, the Court of Appeals denied that portion of the motion seeking an immediate hearing thereon.

Subsequently, and on April 27, 1967, Petitioners' motion for summary reversal of the order and judgment of the District Court came before the Court of Appeals, Bazelon, Chief Judge, and Burger and Leventhal, Circuit Judges. Later that day, the Court of Appeals entered an order denying Petitioners' motions for summary reversal and to dispense with the filing of briefs, ordered that the appeal be heard on the original record on appeal in lieu of the filing of a printed joint appendix, directed counsel to establish a mutually agreeable briefing schedule by conferring with the Clerk of the Court and directed the Clerk "to schedule this case for argument on a day as soon after the briefs are filed as the business of the Court will permit."

On May 4, 1967, Petitioners, cognizant that they could not obtain review in this Court before well into the October, 1967, Term by any other procedure than that established by Rule 20 of the Revised Rules of this Court, informed the Court of Appeals that they intended to file an application for a writ of certiorari pursuant thereto. At the same time, Petitioners moved the Court of Appeals to defer any further consideration of their appeal pending the decision of this Court on their application for a writ of certiorari pending judgment below. Thereafter, and on May 5, 1967, Petitioners filed and served a designation of the entire record

in the Court of Appeals. On May 10, 1967, the Court of Appeals recognizing "that novel issues of substantial public importance were tendered which . . . should be resolved at an early date" entered an order providing that the time for filing of briefs in that court be extended pending disposition of this Petition by this Court, that the order of the Court of Appeals would be stayed if this Petition is granted, that except as stated in the order, the appellants' motion to stay proceedings was denied without prejudice to the filing of any motion to advance argument if the briefs are filed in the Court of Appeals, and that either party may seek further relief by appropriate motion for good and sufficient cause shown.

Following the denial by this Court of Petitioners' application for a writ of certiorari pursuant to Rule 20,³ argument was had in the Court of Appeals. On February 28, 1968, the Court of Appeals affirmed the dismissal of the complaint. Its opinion is appended hereto as Appendix B.

³ 387 U.S. 933.

REASONS FOR GRANTING THE WRIT

I. The Constitutional Issues Advanced by the Petitioners in This Case Are Serious and Substantial.⁴

1. The action of the majority of the House of Representatives in refusing to allow a duly elected Representative of the people who meets all the constitutional qualifications for membership in the House to take his seat and further barring him from membership in the House for the entire 90th Congress violates the Constitution of the United States.

A. The House of Representatives is required under the Constitution to seat a duly elected Congressman who meets all the qualifications for membership in the House set forth in the Constitution.⁵

(i) *It was the firm intention of the Framers that the legislature was to have no power to alter, add to, vary or ignore the constitutional qualifications for membership in either House.*

The history of the proceedings at the Constitutional Convention of 1787 during which the age, citizenship and inhabitancy qualifications for membership in the House were debated and accepted,⁶ and all other qualifications

⁴ Petitioners specifically incorporate by reference herein, their previous petition for certiorari pursuant to Rule 20.

⁵ Counsel wish to express their appreciation to Harriet Van Tassel, a member of the New York Bar, for her intensive research work on the materials included in this section.

⁶ Article I, §2, Clause 2 reads:

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected be an inhabitant of the State in which he shall be chosen."

whatsoever were rejected, reveals the unmistakable intention of the Enactors that neither branch of the Legislature was to have any power to alter, add to, vary or ignore the constitutional qualifications. Accordingly the power of each House to be the "judge of the . . . qualifications of its own members",⁷ was, in the intention of the Framers, restricted solely to these qualifications set forth in the Constitution itself.

The legislative history of both of these critical clauses during the Philadelphia convention makes this crystal clear. As Professor Charles Warren describes the proceedings in his authoritative study of the Constitutional Convention, *The Making of our Constitution*, (1928), the intention of the Founding Fathers, that the Legislature was to have no power to alter, add to or ignore the Constitutional qualifications for membership in either House could not have been clearer.

After agreeing upon the age, citizenship and inhabitancy qualifications, 2 Farrand, *Records of the Federal Convention*, p. 248, *et seq.*, the Convention turned to a proposal of Gouveneur Morris which would "leave the Legislature entirely at large" to set qualifications for membership in each House. 2, Farrand, p. 250. The effect of this proposal, Professor Warren points out, "if adopted, would have been to allow Congress to establish any qualifications which it deemed expedient." *Warren*, at p. 420.

A debate, sweeping in its consequences for the establishment of the fundamental principles of representative democracy in this country, then developed. Mr. Williamson, of

⁷ Article I, Section 5, reads in pertinent part:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."

North Carolina, and Mr. Madison, of Virginia, strongly opposed such a proposal. Mr. Williamson argued:

"This could surely never be admitted: Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body." 2 Farrand, *Records of the Federal Convention*, p. 250.

Mr. Madison warned that to permit the Congress to establish such qualifications as it deemed expedient, would be "improper and dangerous". Madison's own summary of his position at the Convention is compelling:

"Mr. (Madison) was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest. . . . It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of [a weaker] faction."

. . .

"Mr. (Madison) observed that the British Parliamt. possessed the power of regulating the qualifications

* Farrand, Vol. 2, p. 250.

both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention.* They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties."

The conclusion which flows from this legislative history is inescapable for as Professor Warren points out:

"The Convention evidently concurred in these views, for it defeated the proposal to give to Congress power to establish qualifications in general by a vote of seven states to four—" Warren, p. 421, Farrand, Vol. 2, p. 250

At the same time the Convention also defeated the proposal for a property qualification. Farrand, Vol. 2, p. 250. And on this same day, August 10, the Convention, without debate or dissent, agreed to that section of the report which provided that: "Each House shall be the judge of the elections, returns and qualifications of its own members." Farrand, Vol. 2, p. 254.

As Professor Warren points out, "the meaning of this provision (which became Article I, § 5 of the Constitution, as finally drafted) is clearly shown" if taken in connection with the legislative actions and debates of August 10th which surrounded its enactment. Warren, *supra*, at p. 420. As Professor Warren summarizes this conclusion:

"Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its mem-

* As Professor Warren points out, Madison's reference "was undoubtedly to the famous election case of John Wilkes in England," Warren, *supra*, at p. 420, who had been excluded as a member by the House of Commons on three occasions in 1769. See Postgate, "That Devil Wilkes," New York, 1929.

bers, other than those qualifications established by the Constitution itself, viz., age, citizenship and residence. For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply. . . . The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications." Warren, *supra*, at p. 421¹⁰

- (ii) *This Court has consistently reaffirmed the conclusion that the House has no constitutional power to refuse to seat a duly elected representative of the people who meets all the qualifications for membership set forth in the Constitution.*

The precise constitutional questions presented by this Petition and the fundamental premises underlying the limitation upon legislative power adopted by the Philadelphia Convention and reflected in the ratifying conventions have been authoritatively discussed by this Court and only recently vigorously reaffirmed.

In *Newberry v. United States*, 256 U.S. 232 (1920), the Court had the occasion directly to reaffirm the conclusion of the Philadelphia Convention that the House has no power under the Constitution to vary in any way the quali-

¹⁰ Indeed, the period of ratification of the Constitution reveals that it would not have been adopted if the ratifying conventions had believed that the Constitution gave to the Legislature any power to refuse to seat an elected representative who met the explicit constitutional qualifications for membership. See *Federalist Papers*, Nos. 52, 60.

fications for membership in the House set forth in the Constitution. This discussion occurred in both the majority opinion of the Court and the concurring opinions of Mr. Justices Pitney, Brandeis and Clarke. Significantly, while the majority and concurring Justices disagreed on the main issue of the case—whether a primary election fell within the meaning of the word “Elections” in Article I, Section Four—all the Justices specifically agreed upon the proposition that the legislature had no constitutional power to alter in any way the qualifications for membership in either House expressly set forth in the Constitution.

In Mr. Justice McReynolds’ opinion for the Court, 256 U.S. at 243 (joined in by Mr. Justice Holmes, Mr. Justice McKenna, and Mr. Justice Day) the position is squarely taken that the legislature has no power to deviate from or alter the qualifications for membership in either House set forth in the Constitution. Thus the opinion for the Court states, at p. 255:

“Section Four was bitterly attacked in the State Conventions of 1787-1789, because of its alleged possible use to create preferred classes and finally to destroy the States. In defense, the danger incident to absolute control of elections by the States and the express limitations upon the power, were dwelt upon. Mr. Hamilton asserted: ‘The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked upon other occasions are defined and fixed in the Constitution and are unalterable by the Legisla-

ture.' The Federalist, LIX, LI. The history of the times indicates beyond reasonable doubt that, if the Constitution makers had claimed for this section the latitude we are now asked to sanction, it would not have been ratified. See Story on the Const. §§ 814, *et seq.*¹¹ 256 U.S. at pp. 255-256.

The concurring opinion of Mr. Justice Pitney, joined in by Mr. Justice Brandeis and Mr. Justice Clarke is equally emphatic in reaffirming the conclusions of the Philadelphia Convention that the legislature had no power to add, alter, or vary the constitutional qualifications for membership in either House. Thus the concurring opinion also adopts approvingly the statements and analysis of Hamilton in Number 60 of the Federalist Papers:

"What was said, in No. 60 of the Federalist, about the authority of the National Government being *restricted* to the regulation of the time, the places, and the manner of elections, was in answer to a criticism that the national power over the subject 'might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others,' as by discriminating 'between the different departments of industry, or between the different kinds of property, or between the different degrees of property'; or by a leaning 'in favor of the landed interest, or the monied interest, or the mercantile interest, or the manufacturing interest'; and it was to support his contention that there was 'no method of securing to the rich the

¹¹ The opinion of the Court proceeds to make it unmistakably clear which are the constitutional qualifications for membership in the House which are "defined and fixed" and "unalterable by the legislature" in its subsequent comment at page 256, "Who should be eligible for election was also stated. 'No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected, be an inhabitant of that State in which he shall be chosen.'" 256 U.S. at p. 256.

preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected,' which formed no part of the power to be conferred upon the national government, that Hamilton proceeded to say that its authority would be 'expressly restricted to the regulations of the *times*, the *places*, and the *manner* of elections.' This authority would be as much restricted, in the sense there intended if 'the manner of elections' were construed to include all the processes of election from first to last. The restriction arose from the express qualifications prescribed for members of House and Senate, and for those who were to choose them; subject to which all regulations of preliminary, as well as of final, steps in the election necessarily would have to proceed." 256 U.S. at 283-284.

The unanimous agreement of the Court in *Newberry* as to the constitutional limitations upon the power of the legislature to alter, vary or deviate from the qualifications for membership in the House, set forth in the Constitution itself, was explicitly reaffirmed by this Court in 1940 in *United States v. Classic*, 313 U.S. 299, which resolved the precise issue as to whether primary elections were "elections" subject to regulation by Congress within the meaning of Section 4 of Article I, which as the Court pointed out had "not been prejudged" by the prior decision in *Newberry*. *United States v. Classic*, 313 U.S. at 317.¹²

In *Classic*, the Court in the opinion of Mr. Justice Stone repeatedly reaffirmed and restated the fundamental premises which grounded the unanimous conclusion of the Court in *Newberry*—that the legislature may not interfere with the free choice of representatives who meet constitutional

¹² See also 40 Mich. L. Rev. 460 (1941); 36 Ill. L. Rev. 475 (1941); 10 Geo. Wash. L.R. 625 (1941).

qualifications for membership in the House. In words reminiscent of the tone of the statements of the Founders, Mr. Justice Stone reminded the Nation once again:

"That the free choice by the people of representatives in Congress, *subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution*, was one of the great purposes of our constitutional scheme of government cannot be doubted." 313 U.S. at 316. (Emphasis added.)

As Mr. Justice Stone wrote, "... a dominant purpose of Section 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives . . . to safeguard the right of choice by the people of representatives in Congress secured by Section 2 of Article I", *United States v. Classic*, *supra*, at pp. 318, 320.¹³

The unanimous views of the Justices in *Newberry* concerning the constitutional prohibition upon legislative

¹³ Only recently in *Stassen for President Citizens Committee v. Jordon*, 377 U.S. 914, in a case in which the issue raised was unrelated to the constitutional questions presented in this petition, in their dissent from the denial of the petition for writ of certiorari, 377 U.S. at 927, Mr. Justice Douglas, the Chief Justice, and Mr. Justice Goldberg saw fit to restate the powerful words of Mr. Justice Stone in *Classic* that "the free choice by the people of representatives in Congress, subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted" at p. 978. This reference to the statement in the *Classic* majority opinion, by Mr. Justice Douglas who dissented in *Classic*, emphasizes the obvious point that the *Classic* dissenting judges, Mr. Justice Douglas, Mr. Justice Black and Mr. Justice Murphy did not base their dissent from the result of the case upon any disagreement with Mr. Justice Stone's formulation of the fundamental constitutional question which is decisive in the present petition.

power to alter or disregard constitutional qualifications for membership reaffirmed by the discussion in *Classic*, was dispositively treated by the Court in this Term in the landmark decision in *Bond et al. v. Floyd et al.*, 385 U.S. 116.

a) The unanimous opinion last Term in *Bond v. Floyd*, *supra*, is the logical extension of the analysis of the Court expressed first in *Newberry*, reaffirmed in *Classic* and now the gravamen of the decision in *Bond*. In understanding the teaching of this Court in *Bond* in respect to the fundamental constitutional proposition at stake in this Petition it is essential to examine first the thoughtful dissenting opinion of Chief Judge Tuttle in the three-judge court which became in a critical way the foundation stone upon which this Court's opinion in *Bond* rests.

In *Bond* this Court does not disagree with Chief Judge Tuttle's direct holding that the Georgia Legislature had no power to refuse to seat Representative-Elect Bond since he met all the stated qualifications set forth in the Georgia Constitution. Rather, the Court would seem to assume the soundness of this proposition (see footnote 13 to the Court's opinion), and proceeds to meet Georgia's second line argument that the State is merely testing one of the constitutional qualifications—the requirement of taking the constitutional oath. This Court's opinion disposes of this contention of the State by its conclusion that the result of the State's asserted power to “look beyond the plain meaning of the oath provisions”, in order to determine whether this Representative-Elect “may take the oath with sincerity”, 385 U.S. 116, at 130, as applied to the facts of this case, violated the First Amendment to the Federal Constitution, 385 U.S. 116, at 137.

Chief Judge Tuttle met the primary constitutional issue posed in this petition in a forthright manner. In the face of a concession by the State that the Representative-Elect met all the stated qualifications for membership in the House, see 385 U.S. at 129, Chief Judge Tuttle remarked:

"In the absence of a strong showing of judicial interpretation to the contrary, it would seem that simple justice would require a holding that where specific qualifications are stated for an office and the Legislature is given the power to judge whether an aspirant for the office is 'qualified,' the legislature, as judge, should be required to look to the stated qualifications as the measuring stick. To hold to the contrary and permit the House as judge to go at large in a determination of whether Representative-Elect "A" meets undefined, unknown and even constitutionally questionable standards shocks not only the judicial, but also the lay sense of justice."

Chief Judge Tuttle then explained in a clarifying manner a question which has seemed to confuse many commentators in the past as to why there have been few direct legal precedents exactly on this issue. He pointed out:

"It can be readily understood why there are few legal precedents to give guidance in such a situation. In the first place, it can be assumed that members of a state or national legislature are prone to recognize the right of the electorate to choose as their representative whom they want to serve them. Thus, there may not be expected to be many clear precedents. Further, it is readily apparent that in those cases in which a legislative body has exceeded its authority the shortness of the term of office may make moot any contest in court." 251 F. Supp. 333, 352.

Because of the understandable paucity of judicial opinions, Chief Judge Tuttle relied heavily upon certain legisla-

tive precedents.¹⁴ However, in addition, he placed great emphasis upon the once-famous, but now rarely remembered, Report of the Association of the Bar of the City of New York in 1920 under the Chairmanship of Charles Evans Hughes, later Chief Justice of this Court, including such distinguished representatives of the American bar as Joseph M. Proskauer, Ogden L. Mills, Morgan J. O'Brien and Louis Marshall. The Committee was appointed at the time of the expulsion of five members of the Socialist Party from the New York State Assembly. Its mandate from the Bar Association was to "appear before the Assembly or its Judiciary Committee and take such action as is required to safeguard and protect the principles of representative government guaranteed by the Constitution which are involved in the proceedings now pending."

The Committee filed a brief because as they said they regarded "these proceedings as inimical to our institutions, because they tend to subvert the very foundation upon which they rest—representative government."

Chief Judge Tuttle singled out for consideration the conclusion of this eminent committee of American lawyers concerning the critical constitutional question as to the power of a legislature to exclude a duly elected member for grounds other than expressly stated in the Constitution.¹⁵

¹⁴ E.g., see Contested Election Cases of *William McCreery*, 1 Hinds §381 et seq.; *Benjamin Stark*, 1 Hinds §433; *Grafton v. Conner*, 1 Cong. Globe, Part 3, 41st Cong., 2d Session, 1869-70, pp. 2322-23; and *William Langer*, S. Jour. 77th Cong., 1st Session, p. 8, et seq., 2d Session, p. 3, et seq.

¹⁵ Although the Committee made it plain in its reports that the New York Assembly action was an action for *expulsion* rather than one to determine the qualifications of its members, it felt that it was critical, because of legislative and public confusion on this point, to state its views on the power of a legislature to judge the "qualifications" of elected members.

The Committee stated in its Brief its measured opinion as to this fundamental issue:

"We contend that the opinion expressed by Senator Knox in the case of Senator Smoot, *supra*, correctly defines what is meant by qualification. The constitution expressly specifies a number of disqualifications. . . . The principle of constitutional interpretation applicable to this phase of the subject was elaborated in classic phrase by Chancellor Sanford in *Barker v. People*, 3 Cowen, 703, which, although decided in 1824, and therefore involving the interpretation of an earlier Constitution, is nevertheless as applicable in principle to the present Constitution: 'Eligibility to public trust, is claimed as a constitutional right, which cannot be abridged or impaired. The Constitution established and defines the right of suffrage; and gives to the electors and to their various authorities, the power to confer public trust. . . . *Excepting particular exclusions thus established, the electors and the appointing authorities are, by the Constitution, wholly free to confer public stations upon any person, according to their pleasure. The Constitution giving the right of election and the right of appointment; these rights consisting . . . essentially in the freedom of choice; and the Constitution also declaring that certain persons are not eligible to office; it follows from these powers and provisions, that all other persons are eligible. Eligibility to office is not declared as a right or principle, by any expressed terms of the Constitution; but it results, as a just deduction, from the expressed powers and provisions of the system. The basis of the principle, is the absolute liberty of electors and the appointing authorities, to choose and to appoint any person, who is not made ineligible by the Constitution. . . .*' I, therefore, conceive it to be entirely clear that the Legislature cannot establish arbitrary exclusions from office or any general regulation requiring qualifications,

which the Constitution has not required' " (Emphasis supplied by Chief Judge Tuttle.)

Brief of Special Committee appointed by the Association of the Bar of the City of New York, January 20, 1920.

Based upon all of these considerations, Chief Judge Tuttle concluded as a matter of law that "it is clear that Bond was found disqualified on account of conduct not enumerated in the Georgia Constitution as a basis of disqualification. This was beyond the power of the House of Representatives" 251 F. Supp. 333, at 357.

(b) As we have pointed out above, this Court does not appear to disagree with Chief Judge Tuttle's conclusion on the basic constitutional question here involved. Quite to the contrary, in the course of its refutation of Georgia's secondary line of defense that all it was doing was *testing* a constitutional qualification—the necessity of an oath supporting the Constitution—the Court saw fit to set forth in full the fundamental policy reasons we have discussed previously which led the Framers to conclude that the qualifications of members of either House are "defined and fixed by the Constitution" and "are unalterable by the legislature."¹⁶

¹⁶ Fn. 13 of the opinion summarizes these conclusions of the Framers:

"Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views. At the Constitutional Convention of 1787, Madison opposed a proposal to give to Congress power to establish qualifications in general. Warren, *The Making of the Constitution* (1938), 420-422. The Journal of the Federal Convention of 1787 states:

The entire structure of the unanimous Bond opinion in this Court confirms the impression that the Court is in accord with the conclusions of the Framers that the qualifications of representatives of the people were defined and fixed by the Constitution and are unalterable by the Legislature. The Court points out that as to "the only stated qualifications for membership in the Georgia legislature—the State concedes that Bond meets them all" 385 U.S. at 129. In this Court, Georgia did not argue at any length, and if it did, this Court did not think the argument even worthy of extended response, that a legislature has unbounded discretion to set new standards and qualifications for membership.¹⁷ Instead the entire Bond opinion is predicated upon the assumption by both the Court and the State that the Legislature is, indeed, bound by the stated con-

"Mr. Madison was opposed to the Section as vesting an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Government and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution * * * Qualifications founded on artificial distinction may be devised, by the stronger in order to keep out partisans of a weaker faction.

* * * * *

"Mr. Madison observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected: and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties.' 2 Farrand, *The Records in the Federal Convention of 1787* (Aug. 10, 1787), pp. 249-250.

"Hamilton agreed with Madison that:

"The qualifications of the persons who may choose or be chosen * * * are defined and fixed by the constitution: and are unalterable by the legislature.' *The Federalist*, No. 60 (Cooke ed. 1961), 409."

¹⁷ Cf. the contentions of the respondents below in their brief, at page 34.

stitutional qualifications. As we have noted, the State's primary line of defense was that it had a right to test the sincerity of the meeting of a constitutional qualification—the taking of an oath in support of the Constitution. The Court rejected this defense by pointing out that disqualification even “under color of a proper standard” is reviewable and beyond the power of the House if it violates other constitutional prohibitions—in this case the First Amendment.

Unlike the respondents in this case, Georgia did not “claim that it should be completely free of judicial review”, 385 U.S. at 130. It sought to convince this Court that its action of exclusion was based upon the testing of a *proper* constitutional qualification—the necessity of taking an oath. Both the Court and the State therefore implicitly adopted Chief Judge Tuttle's incisive analysis of the fundamental constitutional issue presented in this Petition. The entire posture of the *Bond* case in this Court would tend to confirm the observation of the Chief Judge of the Fifth Circuit that the argument that a Legislature may disregard, enlarge upon, or alter the express constitutional qualifications for a duly elected member of the Legislature “shocks not only the judicial, but also the lay sense of justice.” *Bond v. Floyd*, 251 F.Supp. 333 at page 352.

B. The punishment of exclusion from membership in the House for the 90th Congress inflicted upon the Petitioner violates Article One, Section 9, Clause 3, providing that “No Bill of Attainder or *ex post facto* law shall be passed.”

H. Res. 278, which imposes the severe punishment of exclusion from the House of a duly elected Representative who meets all constitutional qualifications for membership, is a classic Bill of Attainder prohibited by Article One,

Section 9, Clause 3 of the Constitution. It is "a legislative act which inflicts punishment without a judicial trial. *Cummings v. Missouri*, 4 Wall 277; *United States v. Lovett*, 328 U.S. 303 (1946); *United States v. Brown*, 381 U.S. 437 (1965). It represents, in the recent words of the Chief Justice, "the evil the framers had sought to bar; legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, *supra*, at p. 447.

The truly extraordinary nature of the proceedings against Petitioner Powell was that the entire House, its Select Committee, its leadership and the majority which took control at the conclusion of the debates^{17a} openly and frankly regarded the proceedings as a means of imposing "legislative punishment—against specifically designated persons." *United States v. Brown*, *supra*, at 447. The only controversy between the majority and the minority was as to the "form or severity" of the "legislative punishment." *Ibid.* at 447. The resolution of exclusion was therefore a classic Bill of Attainder prohibited by the Constitution. *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Wall. 333; *United States v. Lovett*, *supra*; *United States v. Brown*, *supra*.

C. The punishment of exclusion from Membership in the House inflicted upon the Petitioner violated the due process guarantee of the Fifth Amendment.

The action of the House in excluding the Congressman-Elect for the avowed purpose of punishing him for four alleged findings of misconduct, was in violation of the due process guarantee of the Fifth Amendment to the Constitution of the United States. It was not an action "based

^{17a} See Cong. Rec., Mar. 1, 1967, 1919, *et seq.*

upon reasonable consideration of pertinent matters of fact according to established principles of law" *Newberry v. United States*, 256 U.S. at 285. It was "an arbitrary edict of exclusion." *Newberry v. United States, supra*, at p. 285.

In the famous concurring opinion of Mr. Justices Pitney, Brandeis and Clarke, in *Newberry v. United States, supra*, at p. 285, adopted approvingly by the Court in *United States v. Classic*, 313 U.S. 299, this is made amply clear:

"The power to judge of the elections and qualifications of its members, inhering in each House by virtue of Sect. 5 of Art. I, is an important power, essential to our system to the proper organization of an elective body of representatives. But it is a power to *judge*, to determine upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass on arbitrary act of exclusion" at p. 285.

The extraordinary nature of the proceedings in the House¹⁸ which resulted in findings of fact upon which the House admittedly took *punitive* action against the Member-Elect was that when the Member-Elect moved for certain elementary rights of due process of law at the outset of the hearings of the Select Committee, these were denied.

¹⁸ Until this unusual proceeding the House itself has always afforded a Member due process of law when possible punishment is involved. For example in the First Congress, during the contested election case of *Ramsay v. Smith*, 1 Hinds 717, the reports state: "Mr. Smith be permitted to be present from time to time when proofs are taken, to examine the witnesses and to offer counter-proofs—", 1 Hinds 717. See for example Statement of Congressman Robeson in the 47th Congress (1882) in discussing procedures to be followed in an exclusion case: "We are a court, then, of high equity, proceeding according to legal processes to investigate truths, the conditions of which are defined and fixed by constitutional law." Cf. also the full procedural guarantees afforded in every respect to the Mississippi Members challenged in the *Mississippi Contested Elections of 1965*.

The Member-Elect had requested these rights including, but not limited to, the following:

"(1) Fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser;

(2) the right to confront his accusers and in particular to attend in person and by counsel, all sessions of this Committee at which testimony or evidence is taken and to participate therein with full rights of cross-examination;

(3) the right to an open and public hearing;

(4) the right to have this Committee issue its process to summon witnesses whom he may use in his defense;

(5) the right to a transcript of every hearing."

The principal requests of the petitioner for the elementary rights of due process of law required when adjudication will result in punishment, see *Greene v. McElroy*, 360 U.S. 474, were denied by the Committee upon the rather astounding ground that "This is not an adversary hearing." Hearings of Select Committee, *supra*, at p. 59. To make it amply clear why these elementary procedural rights of notice, statement of charges, confrontation and cross-examination were being denied, the Chairman concluded his ruling by stating: "Again the Committee states that this is an inquiry and not an adversary proceeding." Hearings of Select Committee, *supra*, at p. 59.¹⁹

¹⁹ It should be noted that in its final report Honorable John Conyers, Jr., Member from Michigan and a member of the Select Committee, dissented from this ruling, stating, in part:

"A. Any Member or Member-elect and his counsel should be afforded the right to cross-examine all witnesses brought before this committee or any other committee inquiring into the qualifications, *punishment*, final right of a Member to be seated, or other related questions." (Emphasis added.)

Report of Select Committee, *supra*, at p. 35.

The truly extraordinary nature of these rulings denying the petitioner the most elementary rights of due process of law, based on the theory that the proceeding which ultimately resulted in punishment was not "adversary" in nature but merely an "inquiry", is underscored by the procedures followed contemporaneously by the other House in the hearings involving Senator Thomas Dodd. At the outset of the Dodd hearings the Chairman stated:

"Senator Dodd will have all his rights protected at this hearing. He may attend the hearings and may testify if he wishes. He may be accompanied by counsel of his own choosing. He or his counsel will be permitted to cross-examine witnesses and offer evidence in his own behalf."²⁰

- D. The Exclusion of the Petitioner violated his rights and the rights of the overwhelming Negro majority of the citizens of the 18th Congressional District guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.**

The uncontested circumstances surrounding the refusal of the majority of the House to seat the Petitioner, the duly elected and constitutionally qualified choice of the people of the 18th Congressional District of New York, as their representative reveals a serious question as to whether the Petitioner's rights as a Negro citizen, and the rights of the approximately 400,000 Negro citizens residing in the 18th Congressional District of New York to the freedom and equality guaranteed to them by the Wartime Amendments have been violated.

²⁰ In this connection, see *Report of the National Advisory Commission on Civil Disorders*. New York: Bantam Books (1968).

II. The dismissal of the complaint by the District Court for want of jurisdiction of the subject matter totally disregards the most historic opinions of this Court and unless speedily reversed will seriously undermine the constitutional role of the Federal Judiciary as the ultimate guardian of the "very essence of civil liberty." *Marbury v. Madison*.

A. The dismissal of the complaint for "want of jurisdiction of the subject matter" is in violation of Article III of the Constitution and the most authoritative decisions of this Court.

Once again, as in *Baker v. Carr*, 369 U.S. 186, the District Court's "opinion reveals that the court rested its dismissal upon lack of subject-matter jurisdiction and lack of a justiciable cause of action without attempting to distinguish between these grounds." *Baker v. Carr*, at p. 196. As in *Baker v. Carr*, the District Court below "was uncertain as to whether our cases withholding judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject-matter for judicial consideration—what we have designated 'non-justiciability.'" *Baker v. Carr*, at p. 198. As in *Baker v. Carr*, here also "the distinction between the two grounds is significant," *supra*, at p. 198 (emphasis added).

As this Court pointed out in *Baker*, "in the instance of non-justiciability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, Sect. 2),

or is not a 'case or controversy' within the meaning of that section; or the cause is not described in the jurisdictional statute" *Baker*, at p. 198 (emphasis added).

Nothing could be plainer than that the matter in this complaint arises under the Constitution of the United States and that the conclusion of the District Court that the complaint must be dismissed "for want of jurisdiction over the subject-matter" [Appendix A to this Petition] requires immediate reversal.

As this Court reminded the District Court in *Baker*, "Article III of the Federal Constitution provides that 'The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority. . . .'" And, as in *Baker*, it is obviously "clear that the cause is one which 'arises under' the Federal Constitution," *supra*, at 199. For, as in *Baker*, "dismissal of the complaint upon the ground of lack of jurisdiction of the subject-matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit' *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, or 'frivolous', *Bell v. Hood*, 327 U.S. 678, 683." That the claim is insubstantial must be 'very plain'. *Hatt v. Keith Vaudeville Exchange*, 262 U.S. 271, 274" *Baker*, at p. 199.

B. The subject-matter of this suit was justiciable and the opinion of the District Court dangerously undermines the historic constitutional role of the Federal Judiciary as the guardian of the civil and political liberties of the people.

The extraordinary confusion in the District Court in holding that the complaint is "dismissed for want of jurisdiction of the subject-matter" resulted in precisely the

"significant" consequences prophesied in *Baker*. Since the district court confused "justiciability" with federal subject-matter jurisdiction, it never proceeded to "the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker, supra*, at p. 198.

In the setting of this case this failure of the District Court had the most serious juridical and national consequences. By failing to decide these questions, it could not possibly resolve properly fundamental issues of justiciability, *Baker v. Carr, supra*; leaving unresolved questions of "transcendent constitutional importance," Respondents' Memorandum, *supra*, p. 3, the speedy resolution of which is required in the interest not only of the parties here involved, but the Nation itself.

- (i) *The claim that the refusal of the majority of the House to seat a duly elected Representative of the people who meets all constitutional qualifications for membership in the House violated the Constitution, is clearly justiciable.*

In the words of Mr. Justice Brennan for the Court in *Baker v. Carr*, quoting from *Nixon v. Herndon*, 273 U.S. 536, 540, the conclusion of the District Court that this concededly grave contention is non-justiciable "is little more than a play on words." *Baker, supra*, at p. 209. As the Court points out, "of course the mere fact that the suit seeks protection of a political right does not mean that it presents a political question." *Baker*, at p. 209. The Court then proceeded to what is the heart of the analysis of the so-called "political question doctrine":

"Much confusion results from the capacity of the 'political question' label to obscure the need for a case-by-case inquiry. *Deciding whether a matter has in any*

measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is in itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution," at p. 211 (emphasis added).

This is the very essence of the error of the District Court. In order to decide whether "a matter has been in any measure committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed," *Baker, supra*, at p. 211, is "itself a delicate exercise in constitutional interpretation." But this is precisely what the District Court refused to do and what this Court is now called upon to do as the "ultimate interpreter of the Constitution." *Baker, supra*, at p. 211.

The District Court refused to engage in the judicial role it must assume. It declined to meet its responsibility under Article III, the "delicate exercise in constitutional interpretation" which can alone answer the question as to whether this case presents a traditional non-justiciable issue—as to whether the matter is one in "the performance of which entire confidence is placed by our Constitution," *Marbury v. Madison, supra*, at 162, in the Legislature.

- (ii) *The remaining constitutional questions are uncontestably justiciable and Respondents do not seriously question the appropriateness of judicial consideration of these contentions.*

No serious contention can be made that the remaining constitutional issues²¹ presented in the case are non-

²¹ The legislative action violates (1) the Bill of Attainder Clause, (2) the Due Process Guarantee of the Fifth Amendment, and (3) the Wartime Amendments.

justiciable. Both the District Court and the Respondents prefer to handle this dilemma by ignoring the claims. This is understandable since these questions are traditionally the subjects for judicial review.

C. This Court has ample power to grant whatever relief is required to remedy the violations of Petitioners' constitutional rights.

(i) The relief requested by Petitioners are the normal judicial remedies traditionally designed to "protect the constitutional rights of individuals for legislative destruction" *Wesberry v. Sanders*, 376 U.S. 1. They include conventional requests for injunctive and declaratory relief against the enforcement of unconstitutional action of a legislature, the resolution permanently barring Mr. Powell from membership in the entire 90th Congress. See *Ex parte Young*, 209 U.S. 123; *Dombrowski v. Pfister*, 380 U.S. 479; Cf. *Marbury v. Madison*, *supra*.

(ii) In addition, Petitioners seek the issuance of a writ of mandamus directed to the Speaker of the House ordering that officer to swear in the Petitioner as the Representative from the 18th Congressional District of New York. For some reason this request has created the greatest degree of consternation among the Respondents. But this is no novel issue of law. The availability of a writ of mandamus under these circumstances was settled in 1803 in *Marbury v. Madison*. In *Marbury*, petitioners sought a writ of mandamus against an exalted officer of the Executive Branch, the Secretary of State. Then, as now, the Respondents urged that in some way, the issuance of such a writ would be to "intrude into . . . the prerogatives . . ." of another Branch. *Marbury v. Madison*, *supra*, at p. 168. The answer of Chief Justice Marshall to this fear established principles of law which guide us to this day. In words

most appropriate to the present Petition, the Chief Justice wrote:

"If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone, exempts him from being sued in the ordinary mode of proceedings, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?"

Marbury v. Madison, at p. 170.

It would be demeaning to the House of Representatives of this great nation to suggest that it would not adhere to the time-honored words of this Court that "the government of the United States has been emphatically termed a government of laws and not of men." *Marbury v. Madison*, *supra*, at p. 162. Like *Marbury*, this is a "delicate case" (at p. 168). And as in *Marbury*, we are confident that the House is deeply committed, as indeed are all Americans, to the proposition that "it is emphatically the province and duty of the judicial court to say what the law is." *Marbury* at p. 175. This case then calls in question "the very essence of civil liberty [which] consists in the right of every individual to claim the protection of the laws, whenever he receives an injury".²² *Marbury* at p. 163.

(iii) The refusal of the District Court to certify the necessity for a three-judge statutory court was clearly

²² The comment of the Chief Justice in *Marbury* is interesting in this respect:

"In Great Britain the King himself is sued in the respectful form of petition and he never fails to comply with the judgment of his court." *Marbury* at p. 163.

erroneous. The issues raised are conceded by all to be of "fundamental constitutional significance." Respondents' Memorandum, *supra*. The Court of Appeals itself is of the view that "novel issues of substantial public importance" are involved. Federal subject matter jurisdiction was clearly present. See Point II, *supra*. Since the enjoining of congressional action was requested, 28 U.S.C. 2282 required the certification of a three-judge court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713; *Schneider v. Rusk*, 372 U.S. 224; *Reed Enterprises v. Corcoran*, 354 F. 2d 519 (App. D.C.); *Stamler v. Willis*, 371 F. 2d 413 (C.A. 7, rehearing denied *en banc*, Feb. 13, 1967).

If this statutory duty of the District Court had been met, a prompt hearing on the constitutional issues as well as issue of justiciability raised by the Respondents would have already occurred, see *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 and *Stamler v. Willis*, 371 F. 2d 413. Direct appeal to this Court by either party, allowed by the statute, of the "novel issues of substantial public importance" would have permitted the early resolution of these issues, admitted by all as essential to the public interest and the statement of Respondents in their Memorandum to the Court of Appeals. Accordingly, if this Court believes that a three-judge statutory court should have been convened, we respectfully suggest that the Court of Appeals be directed to order the District Court to certify the necessity for such a court, that such a court be forthwith convened, and that this Court direct the statutory district court to issue forthwith the relief prayed for herein.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day served a copy of the foregoing brief upon the party of record in this proceeding by delivering three copies thereof properly addressed to the attorney of record.

WILLIAM M. KUNSTLER

New York, N. Y.
May 28, 1968.

APPENDIX A

Opinion of District Court

Plaintiffs assert that Powell meets the qualifications of age, citizenship, and inhabitancy specified in Article I, Section 2, Clause 2 of the Constitution (and holds a valid certificate of election) and that under Article I, Section 5, Clause 1, these are the exclusive tests for admission to House membership. In addition, plaintiffs allege that House Resolution 278 subjects them to discrimination based upon race and color in violation of the 13th and 15th Amendments to the Constitution; that the Resolution constitutes a bill of attainder, an ex post facto law, and cruel and unusual punishment; and that the Resolution violated procedural due process and the 5th Amendment.

APPENDICES

APPLICATION FOR A THREE-JUDGE COURT

28 U.S.C. § 2282 provides as follows:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

It is plain by its terms that the foregoing section applies to an "Act of Congress" only. The history of the statute is wholly consistent with this interpretation. The matter complained of here, House Resolution 278, is patently not an Act of Congress. It follows, therefore, that convening a statutory three-judge court to consider the issues raised by the complaint is neither required nor authorized.

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing brief upon the party of record in this proceeding by delivering three copies thereof properly addressed to the attorney of record.

WILLIAM M. KUNSTLER

New York, N. Y.

May 28, 1968.

APPENDICES

APPENDIX A

Opinion of District Court

Plaintiffs assert that Powell meets the qualifications of age, citizenship, and inhabitancy specified in Article I, Section 2, Clause 2 of the Constitution (and holds a valid certificate of election) and that under Article I, Section 5, Clause 1, these are the exclusive tests for admission to House membership. In addition, plaintiffs allege that House Resolution 278 subjects them to discrimination based upon race and color in violation of the 5th, 13th, and 15th Amendments to the Constitution; that the Resolution constitutes a bill of attainder, an ex post facto law, and cruel and unusual punishment; and that adoption of the Resolution violated procedural due process and the 6th Amendment.

APPLICATION FOR A THREE-JUDGE COURT

28 U.S.C. § 2282 provides as follows:

“An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.”

It is plain by its terms that the foregoing section applies to an “Act of Congress” only. The history of the statute is wholly consistent with this interpretation. The matter complained of here, House Resolution 278, is patently not an Act of Congress. It follows, therefore, that convening a statutory three-judge court to consider the issues raised by the complaint is neither required nor authorized.

The question whether a joint resolution of Congress, approved by the President, would be an "Act of Congress" within the meaning of 28 U.S.C. § 2282 is not before this Court and, therefore, is not decided. In any event, the decision of the Court on the motion to dismiss would moot the question of the right of plaintiffs to a three-judge court in the case at bar.

MOTION TO DISMISS—JURISDICTION

The defendants have moved under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint, for the following reasons:

1. This Court does not have jurisdiction over the subject matter of this action;
2. This Court does not have jurisdiction over the persons of the defendants;
3. The complaint fails to state a claim upon which relief may be granted.

In their brief the defendants have broken down the three contentions for dismissal set forth above into a number of sub-heads. Each of these sub-heads has been briefed and argued with learning and care by both sides.

1. *Speech or Debate Clause*

In the English Bill of Rights ("An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown; passed in the 1st year of William and Mary, A.D. 1689") it was provided:

"That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." [Emphasis added]

This provision was carried forward in our Constitution, Article I, Section 6, Clause 1, in the following language:

"...; and for any speech or debate in either House, they [The Senators and Representatives] shall not be questioned in *any other place*." [Emphasis added]

The above provision of the Constitution may well bar jurisdiction of the Court in the matter here in controversy, but the Court does not bottom its decision on this point.

2. *Right of the House of Representatives to Determine the Qualifications of Its Own Members*

The question of whether there is an absolute right in the House of Representatives to determine the qualifications of its own members will not be touched on herein.

Let us consider whether the House has correctly interpreted the word "qualifications" in Article I, Section 5, Clause 1 of the Constitution which provides:

"Each House shall be the judge of the elections, returns, and *qualifications* of its own members, and a majority of each shall constitute a quorum to do business. . . ." [Emphasis added]

It can be argued with great force and conviction that the word "qualifications" covers any cause that the Members of the House, by majority vote, choose it to cover, including:

1. Contempt of the Courts of New York;
2. Improper maintenance of an employee on a Member's clerk-hire payroll;
3. As a Member and committee chairman, permitting and participating in improper expenditure of government funds for private purposes; and

4. Acting in a manner contemptuous of the House and unworthy of a Member of the House of Representatives.

On the other hand, it can be argued with force and conviction that in light of Article I, Section 5, Clause 2 of our Constitution, which reads:

“Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.”

the word “qualifications” in Article I, Section 5, Clause 1 is limited to age, length of citizenship, and inhabitancy in the state from which a person shall be chosen, as provided in Article I, Section 2, Clause 2, plus a valid election certificate.

The Court deems it unnecessary to resolve this question in view of its disposition of the matter of jurisdiction under the doctrine of separation of powers.

3. Separation of Powers

In this Court's view of the case, the complaint and the relief prayed for raise one issue of such transcendent importance that all other issues in the case pale into insignificance. This issue constitutes a “political question.” The question facing the Court may be simply stated as follows: Would consideration of the complaint on the merits and granting any of the requested relief violate the doctrine of “separation of powers”?

At first blush it might be thought that the Supreme Court answered this question in the negative in *Bond v. Floyd*, 385 U.S. 116 (1966). In that case the Supreme Court invalidated a resolution of one branch of the Georgia Legislature refusing to seat Bond, holding that the resolution

violated Bond's right to freedom of speech guaranteed by the First Amendment of the federal Constitution. The *Bond* case did not present a "political question" nor did it raise the question of separation of powers between coordinate branches of government.

The Supreme Court stated concisely when a "political question," which includes the doctrine of separation of powers, arises, and when it does not arise, in the case of *Baker v. Carr*, 369 U.S. 186, 210 (1962), when the Court said:

"[I]n the . . . 'political question' cases, it is the relationship between the judiciary and the coordinate federal judiciary's relationship to the States, which gives rise to the 'political question.'

nate branches of the Federal Government, and not

". . . The non-justiciability of a political question is primarily a function of the separation of powers." 369 U.S. at 210.

As to the precise issue which I deem to be raised here, there are no cases directly in point. This Court has not found a case nor has any been cited to it where the complaint and the relief prayed therein have posed to the Court with such stark clarity the question of separation of powers between the Legislature, as represented by the House of Representatives of the United States, and the Federal Judiciary. The following cases may be said to touch on the point but each of them is easily distinguishable on its facts:

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803);

Luther v. Borden, 48 U.S. (7 Howard) 1 (1849);

Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867);

Kilbourn v. Thompson, 103 U.S. 168 (1880);
United States v. Ballin, 144 U.S. 1 (1892);
In re Chapman, 166 U.S. 661 (1897);
Massachusetts v. Mellon, 262 U.S. 447 (1923);
Springer v. Philippine Islands, 277 U.S. 189
 (1928);
Barry v. United States ex rel. Cunningham, 279
 U.S. 597 (1929);
Bell v. Hood, 327 U.S. 678 (1946);
Colegrove v. Green, 328 U.S. 549 (1946);
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S.
 579 (1952);
United States v. Johnson, 383 U.S. 169 (1966);
Hearst v. Black, 66 App.D.C. 313, 87 F.2d 68
 (1936);
Sevilla v. Elizalde, 72 App.D.C. 108, 112 F.2d 29
 (1940);
Pauling v. Eastland, 109 U.S.App.D.C. 342, 288
 F.2d 126, cert. denied, 364 U.S. 900 (1960);
Reif v. Barrett, 355 Ill. 104, 188 N.E. 889 (1933);
Peabody v. Boston, 115 Mass. 383 (1874);
People ex rel. Drake v. Mahaney, 13 Mich. 481
 (1865);
State ex rel. Boulware v. Porter, 55 Mont. 471, 178
 P. 832 (1919);
Brown v. Lamprey, 106 N.H. 121, 206 A.2d 493
 (1965).

Let us review briefly, and with a broad brush, the emergence of the doctrine of separation of powers as a principle of free government and the extent to which the doctrine had developed at the time our forefathers prepared the Constitution in 1787 for adoption by the people.

When the doctrine began to bud in ancient Greece, separation of powers referred to the division of authority between the high and the low; between the king, the aris-

ocracy, and the masses; and between the executive and the legislature. To Solon (638?-559 B.C.), the doctrine meant increasing the power of the poor while balancing this power with aristocratic councils and magistrates. Thucydides (471?-400? B.C.) praised a fusion government of the high and the low. Plato (427?-347 B.C.) saw the need for wise aristocrats or kings, and the Statesmen.

Aristotle (384-322 B.C.) contributed the first statement of the doctrine as we now conceive it. He described government as divided into three parts—deliberators, magistrates, and judicial functionaries.

Polybius (205?-125? B.C.) said the Roman Republic was at its best when it combined democratic, aristocratic, and royal elements. Cicero (106-43 B.C.) and Machiavelli (1469-1527) praised government in which all the elements were combined.

John Locke (1632-1704), in order to prevent tyranny, would divide the government between two organs, the executive and the legislative.

Montesquieu (1689-1755) stated the doctrine as it was conceived in the early 18th century as follows:

“The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

“Again, there is no liberty, if the judiciary power be not separated from the legislative and executive.

Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

"There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." Montesquieu, *The Spirit of the Laws*, 154 (6th Ed. 1792).

However, Montesquieu thought the judiciary of little importance and said at p. 157, *supra*:

"Of the three powers above-mentioned, the judiciary is in some measure next to nothing: there remains therefore only two; and as these have need of a regulating power to moderate them, the part of the legislative body composed of the nobility, is extremely proper for this purpose."

It remained for Blackstone (1723-1780) to express the doctrine as it reached full development with the addition of a strong, independent judiciary into the threefold shield of freedom, a government separated into three parts; the legislative, the executive and the judiciary:

"It is probable, and almost certain, that in very early times, before our Constitution arrived at its full perfection, our kings, in person, often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself can not now alter but by act

of Parliament. And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III., c.2, that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established, but that it may be lawful to remove them on the address of both houses of Parliament. And now, by the noble improvements of that law in the statute of 1 Geo. III., c.23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behavior, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare that 'he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice, as one of the best securities of the rights and liberties of his subjects, and as most conducive to the honor of the crown.'

. . .

"In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which can not subsist long in any state, unless the administration of common justice be in some degree separated from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of

law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reasons, by the statute of 16 Car I., c. 10, which abolished the Court of Star Chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council, who, as then was evident from recent instances, might soon be inclined to pronounce that for law which was most agreeable to the prince or his officers. Nothing, therefore, is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state." 1 Blackstone, *Commentaries on the Laws of England*, 267-68, 269 (21st Amer. Ed. 1854).

By the time the members of the Constitutional Convention met in 1787 the doctrine of separation of powers between the legislative, the executive, and the judiciary had become an axiom of free government.

In the Federalist papers, which appeared in 1787 and 1788 in defense of the proposed federal Constitution, Madison was assigned the task of explaining the principle of separation of powers and proving that the framers had not disregarded it. Madison did not argue that the principle was a good one. He started with the premise that it was good and that it was a necessary doctrine to be included in the Constitution to insure a republic that guaranteed freedom to its people; this premise was accepted by the people to whom his arguments were addressed.

In The Federalist, No. 47, published January 30, 1788, Madison said:

"One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that

the legislative, executive and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner, as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

"No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed or elective, may justly be pronounced the very definition of tyranny. Were the federal constitution therefore really chargeable with the accumulation of powers or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies, has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense, in which the preservation of liberty requires, that the three great departments of power should be separate and distinct." *The Federalist*, No. 47, 323 (Cooke Ed. 1961) (Madison).

James Wilson, who was influential in obtaining the adoption of the Constitution, said:

"Though the foregoing great powers—legislative, executive, and judicial—are all necessary to a

good government; yet it is of the last importance, that each of them be preserved distinct, and unmingled, in the exercise of its separate powers, with either of with both of the others. Here every degree of confusion in the plan will produce a corresponding degree of interference, opposition, combination, or perplexity in its execution." Wilson, *Works*, 407 (1804).

The doctrine of separation of powers, which developed over a period of two millennia, is firmly imbedded in the warp and woof of our Constitution.

It is the conclusion of this Court that for the Court to decide this case on the merits and to grant any of the relief prayed for in the complaint would constitute a clear violation of the doctrine of separation of powers. For this Court to order any member of the House of Representatives of the United States, any officer of the House, or any employee of the House to do or not to do an act related to the organization or membership of that House would be for the Court to crash through a political thicket into political quicksand.

This Court holds, therefore, that by reason of the doctrine of separation of powers, this Court has no jurisdiction in this matter.

The Court rules as follows:

1. The application for a three-judge Court is denied.
2. The complaint is dismissed for want of jurisdiction of the subject matter in this Court.
3. The prayer for a preliminary injunction falls with the dismissal of the complaint.

George L. Hart, Jr.
 GEORGE L. HART, JR.,
Judge.

Date: April 7, 1967.

SUPREME COURT. U.

Appendix B

FILED

MAY 28 1968

JOHN F. DAVIS, CLERK

No. ~~138~~ 138

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,897

ADAM CLAYTON POWELL, JR., et al.,
Appellants

v.

JOHN W. McCORMACK,
Speaker of the House of Representatives, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia

Decided February 28, 1968

Mr. Arthur Kinoy, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, *Messrs. Frank D. Reeves* and *Herbert O. Reid, Sr.*, with whom *Mr. William M. Kunstler* and *Mrs. Jean Camper Cahn*, were on the brief, for appellants.

Mr. Bruce Bromley, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Lloyd N. Cutler*, *John H. Pickering*, *Louis F. Oberdorfer*, *Max O. Truitt, Jr.*, and *Timothy B. Dyk*, were on the brief, for appellees.

Before BURGER, McGOWAN and LEVENTHAL, *Circuit Judges*.

BURGER, Circuit Judge. This case presents for the first time the question of whether courts can consider claims that a Member-elect has been improperly excluded from his seat in the United States House of Representatives. On the basis of findings by that body that Member-elect Adam Clayton Powell, Jr., had been guilty of misconduct as a Member of a prior Congress and of contumacious conduct toward the courts of the State of New York, the House voted to exclude him from the seat in the 90th Congress to which he had been elected in 1966 by the voters of the 18th Congressional District of New York.¹

This suit was brought by Mr. Powell and thirteen voters² of the 18th Congressional District of New York in the United States District Court for the District of Columbia. Appellants sought injunctive relief, mandamus, and a declaratory judgment against Appellees who are Members and officials of the House of Representatives of the 90th Congress. Appellees were sued individually, in their official positions, and as representatives of all Members of the House of Representatives.³ The complaint was accompanied by a motion to convene a statutory three-judge court. The District Court dismissed Appellants' complaint for want of subject matter jurisdiction, *Powell v. McCormack*, 266 F. Supp. 354 (D. D.C. 1967).

While Appellants' claims actually arose as a result of action taken by the House at the time of the organization of the 90th Congress, the factual genesis of that action derived from events involving the alleged conduct of Member-elect Powell during earlier Congresses. The underlying events were summarized in a House Report as follows:

¹ Mr. Powell was thereafter re-elected to the Congress in the special election called to fill the vacancy determined to exist by reason of his exclusion. He has not since presented himself to take the oath.

² Appellants are Adam Clayton Powell, Jr., A. Philip Randolph, Percy E. Sutton, Basil Patterson, J. Raymond Jones, Lillian Upshur, Hulan Jack, Geraldine L. Daniels, Antonio Mendez, Hilda Stokley, Margaret Cox, Fannie Allison, Charles B. Rangel, and James P. Jones.

³ See p. 13 *infra*.

During the 89th Congress open and widespread criticism developed with respect to the conduct of Representative Adam Clayton Powell, of New York. This criticism emanated both from within the House of Representatives and the public, and related primarily to Representative Powell's alleged contumacious conduct toward the courts of the State of New York and his alleged official misconduct in the management of his congressional office and his office as chairman of the Committee on Education and Labor. There were charges Representative Powell was misusing travel funds and was continuing to employ his wife on his clerk-hire payroll while she was living in San Juan, P.R., in violation of Public Law 89-90, and apparently performing few if any official duties.

In September 1966, as the result of protests made by a group of Representatives serving on the Committee on Education and Labor, the Committee on House Administration, acting through its chairman, issued instructions for the cancellation of all airline credit cards which had been issued to the Committee on Education and Labor and notified Chairman Powell that all future travel must be specifically approved by the Committee on House Administration prior to undertaking the travel.

The Special Subcommittee on Contracts of the Committee on House Administration, under the chairmanship of Representative Hays of Ohio, conducted an investigation into certain expenditures of the Committee on Education and Labor, which focused primarily on the travel expenses of Chairman Powell and of the committee's staff during the 89th Congress, and the clerk-hire status of Y. Marjorie Flores. Hearings were held on December 19, 20, 21 and 30, 1966, and a report (H. Res. [sic] 2349) was filed just prior to the end of the 89th Congress. . . . Subsequent to the report of the Hays subcommittee and prior to the organization of the 90th Congress, the Democrat Members-elect, meeting in caucus, voted to remove Representative-elect Powell from his office as chairman of the Committee on Education and Labor.⁴

⁴H.R. REP. NO. 27, 90th Cong., 1st Sess. 1-2 (1967) (footnote omitted). The earlier report concluded that Representative Powell and certain staff employees deceived the approving authorities as to

The 90th Congress met to organize on January 10, 1967. At that time Member-elect Van Deerlin, of California, objected to the administration of the oath to Member-elect Powell.⁵ Upon request, Member-elect Powell stepped aside while the oath was administered to the other Members-elect. Shortly thereafter Representative Udall, of Arizona, introduced a resolution that the oath be administered to Member-elect Powell and that the question of his final right to be seated as a Member of the 90th Congress be referred to a select committee. The debate on this resolution centered on whether to seat Member-elect Powell or to delay his seating pending a committee investigation. Before a vote was taken, Member-elect Powell was permitted to make a statement to the House. The Udall resolution was replaced by a substitute resolution offered by Representative Ford, of Michigan, which was then adopted as House Resolution 1, 90th Congress, 1st Session.⁶

House Resolution 1 referred to a Select Committee the question of whether or not Mr. Powell should be seated. This Select Committee was to be comprised of nine members selected by The Speaker, four of whom would be members of the minority party, designated by the Minority Leader. The Select Committee was authorized to hold hearings and compel the attendance of witnesses and the production of documents by subpoena. House Resolution 1 prohibited Mr. Powell from being sworn in or seated until the House acted on the Committee report. Mr. Powell,

travel expenses and that the record raised a strong presumption that the payment of funds to Mr. Powell's wife violated existing law. H.R. REP. NO. 2349, 89th Cong., 2d Sess. 6-7 (1966).

⁵113 Cong. Rec. H 4 (daily ed. Jan. 10, 1967). The proceedings on January 10, 1967, in the House are found in *id.* at H 4-16.

⁶The roll call vote to bring the Udall resolution to a vote was 126 yeas, 305 nays. *Id.* at H 13-14. After the Ford substitution was agreed upon, the amended resolution was approved by a roll call vote of 364 to 64. *Id.* at H 16.

however, was permitted to receive the pay, allowances, and emoluments of a Member during the course of the investigation. The Select Committee was to report to the House within five weeks after its members were appointed.

On January 19, 1967, The Speaker appointed nine lawyer-Members to the bipartisan Select Committee.⁷ The Select Committee wrote Mr. Powell on February 1, 1967, inviting him to testify and respond to interrogation before the Committee on February 8, 1967. The stated scope of the testimony and interrogation was to include Mr. Powell's

qualifications of age, citizenship and inhabitancy, and the following other matters:

(1) The status of legal proceedings to which [Mr. Powell was] a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which [he had] been held in contempt of court;

(2) Matters of [Mr. Powell's] alleged official misconduct since January 3, 1961.⁸

⁷The Select Committee members were Emanuel Celler (N.Y.) (Chairman), James C. Corman (Calif.), Claude Pepper (Fla.), John Conyers, Jr. (Mich.), Andrew Jacobs, Jr. (Ind.), Arch A. Moore, Jr. (W. Va.), Charles M. Teague (Calif.), Clark MacGregor (Minn.), and Vernon W. Thomson (Wis.).

⁸Letter from Emanuel Celler to Adam Clayton Powell, Jr., February 1, 1967, in *Hearings on H. Res. 1 Before Select Comm. Pursuant to H. Res. 1*, 90th Cong., 1st Sess. 5 (1967) (hereinafter *Hearings*). After a meeting of counsel for Mr. Powell and counsel for the Select Committee held on February 3, 1967, the Committee's chief counsel wrote to Mr. Powell's counsel on February 6, 1967, stating:

[T]he Select Committee desires to interrogate Mr. Powell [as to] paragraphs 1 to 11 of the "Conclusions" contained in the Report of the Committee on House Administration, Special Subcommittee on Contracts (pp. 6 and 7) relating to an investigation into expenditures during the 89th Congress by the House Committee on Education and Labor and the clerk-hire status of Y. Marjorie Flores (Mrs. Adam Clayton Powell).

Letter from William A. Geoghegan to Mrs. Jean C. Cahn, February 6, 1967, in *Hearings* 59.

The letter further advised Mr. Powell that he could be accompanied by counsel and that the hearings would be conducted in accordance with House Rule XI, paragraph 26.⁹

Mr. Powell appeared at the February 8 hearing, accompanied by his attorneys. At this time the Chairman, Mr. Celler, without objection from Mr. Powell, took official notice of the published hearings and conclusions of the Special Subcommittee on Contracts of the Committee on House Administration, relating to the investigation of Mr. Powell conducted during the 89th Congress. See note 4 *supra*, and accompanying text. The Chairman then explained that, in addition to the rights set forth in the letter of February 1, counsel for Mr. Powell would be permitted a reasonable length of time for oral argument and Mr. Powell would be permitted to make a statement to the Committee on all matters as to which he was invited to testify.

Counsel for Mr. Powell moved that the Committee limit its inquiry to Mr. Powell's age, citizenship, and inhabitancy and that, because the scope of the Committee's inquiry was constitutionally limited to these three requirements, it immediately terminate its proceedings and report to the House that Mr. Powell was entitled to his seat.¹⁰ After oral argument on these motions Mr. Powell's counsel made several procedural motions asserting the invalidity of the Commit-

⁹Rule XI, paragraph 26, prescribes committee procedures. In addition to internal housekeeping provisions, it entitles a witness at any hearing to be accompanied by counsel, to submit statements in the discretion of the committee, and to obtain a transcript of testimony, upon payment of costs. H.R. DOC. NO. 619, 87th Cong., 2d Sess. 364-68 (1963).

¹⁰Documentary evidence that Mr. Powell met these three requirements had been previously submitted to the Committee and made part of the record at the hearings. *Hearings* 14-25. Briefs in support of these motions were filed by counsel for Mr. Powell and the American Civil Liberties Union.

tee proceedings for failure to provide adequate notice and comply with the due process requirements of an adversary proceeding. In addition, certain specific procedural rights were requested:

1. Fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser.
2. The right to confront his accuser, and in particular to attend in person and by counsel, all sessions of this committee at which testimony or evidence is taken, and to participate therein with full rights of cross-examination.
3. The right fully in every respect to open and public hearings in every respect in the proceedings before the select committee.
4. The right to have this committee issue its process to summon witnesses whom he may use in his defense.
5. The right to a transcript of every hearing.¹¹

After the Committee took these motions under advisement, Mr. Powell was questioned by counsel for the Committee. After a few questions, Mr. Powell's counsel objected and insisted that Mr. Powell would not proceed further without a ruling on his pending motions. The Select Committee then recessed and, upon reconvening, the Chairman denied all of the motions. With specific reference to the procedural motions, the Chairman said:

This is not an adversary proceeding. The committee is going to make every effort that a fair hearing will be afforded, and prior to this date has decided to give the Member-elect rights beyond those afforded an ordinary witness under the House rules.

The committee has put the Member-elect on notice of the matters into which it will inquire by its notice of the scope of inquiry and its invitation to appear, as well as by conferences with, and a letter from its chief counsel to the counsel for the Member-elect.

¹¹ Hearings 54.

Prior to this hearing the committee decided that it would allow the Member-elect the right to an open and public hearing and the right to transcript of every hearing at which testimony is adduced.

The committee has decided to summon any witnesses having substantial relevant testimony to the inquiry upon the written request of the Member-elect or his counsel.

The Member-elect certainly has the right to attend all hearings at which testimony is adduced and to have counsel present at those hearings.¹²

After these rulings by the Chairman, Mr. Powell was interrogated, but upon advice of counsel he refused to answer any questions except those relating to his age, citizenship, and inhabitancy in New York. At the end of the February 8 hearing, the Chairman denied a request that Mr. Powell be permitted to make a statement at that time, suggesting that it should be renewed subsequently.¹³

By a letter of February 10, Mr. Powell was informed that the next hearing would be held on February 14. He was further advised that, upon written application, the Select Committee would summon any witnesses "having substantial relevant testimony to the inquiry" The letter stated:

The Select Committee has deferred decision on the question raised by the original motion of your counsel as to whether the qualifications for membership in the House, specifically enumerated in Article I, Section 2, of the Constitution, age, citizenship, and inhabitancy, should be deemed exclusive. Further, we are of the opinion that the Select Committee is required by House Resolution 1, 90th Congress, to inquire not only into the question of your right to take the oath and be seated as a member of the 90th Congress, but additionally and simultaneously to inquire into the question

¹²Hearings 59.

¹³Hearings 107.

of whether you should be punished or expelled pursuant to the powers granted by the House under Article I, Section 5, Clause 2 of the Constitution. In other words, the Select Committee is of the opinion that at the conclusion of the present inquiry, it has authority to report back to the House recommendations with respect to your seating, expulsion or other punishment.¹⁴

Finally the letter queried whether in both the seating phase and the punishment and expulsion phase, Mr. Powell would refuse to testify about the legal proceedings against him and his alleged official misconduct. He was again invited to testify and advised he would be allowed to make a statement.

At the hearing on February 14, attended by Mr. Powell's attorneys but not by Mr. Powell, it was stated that Mr. Powell would not testify concerning the court proceedings or alleged official misconduct in either phase of the Committee's inquiry. Mr. Powell's attorneys reasserted their position that age, citizenship, and inhabitancy were the exclusive qualifications, and, further, took the position that no inquiry on the question of punishment or expulsion was possible until a Member had been seated, and that the two issues—seating and punishment or expulsion—could not be merged into one proceeding.¹⁵ The Select Committee then proceeded to hear evidence concerning the New York litigation involving Mr. Powell and evidence concerning the air travel, expense reimbursement and bank accounts of Mr. Powell and his associates.

Neither Mr. Powell nor his attorneys attended the final hearing of the Select Committee on February 16. At that time testimony was received from Mrs. Adam Clayton Powell (Y. Marjorie Flores) with respect to her financial affairs and those of her husband. Testimony was also received

¹⁴Letter from Emanuel Celler to Adam Clayton Powell, February 10, 1967, in *Hearings* 110.

¹⁵*Hearings* 111-13.

from a former assistant to Mr. Powell concerning disbursements for airplane travel. After the close of the hearings, counsel for Mr. Powell submitted another brief, reiterating the points previously raised.

On February 23, 1967, the Select Committee issued its report. Mr. Powell was found to be over 25 years of age, a United States citizen for more than 7 years, and, on the date of his election, an inhabitant of the State of New York.¹⁶ The Committee also found, however, that Mr. Powell had asserted an unwarranted privilege and immunity from the processes of the courts of the State of New York; had wrongfully and wilfully diverted House funds for use of others and himself, in his capacity as a Member of Congress and as a committee chairman; and had made false reports on expenditures of foreign exchange currency to the Committee on House Administration.¹⁷ Based on these findings of fact, the Select Committee recommended the adoption of a resolution stating:

1. That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-elect from the 18th District of the State of New York.

2. That upon taking the oath as a Member of the 90th Congress the said Adam Clayton Powell be brought to the bar of the House in the custody of the Sergeant-at-Arms of the House and be there publicly censured by the Speaker in the name of the House.

3. That Adam Clayton Powell, as punishment, pay to the Clerk of the House to be disposed of by him according to law, \$40,000. The Sergeant-at-Arms of the House is directed to deduct \$1,000 per month from the salary otherwise due the said Adam Clayton Powell and pay the same to said Clerk, said deductions to continue while any salary is due the said Adam Clayton Powell as a Member of the House of Representa-

¹⁶The Committee report noted that no question as to Mr. Powell's age or citizenship had been raised but that members of the House and the public questioned his inhabitancy. H.R. REP. NO. 27, 90th Cong., 1st Sess. 5 n. 7 (1967).

¹⁷*Id.* at 31-32.

tives until said \$40,000 is fully paid. Said sums received by the Clerk shall offset to the extent thereof any liability of the said Adam Clayton Powell to the United States of America with respect to the matters referred to in the above paragraphs 3 and 4 of the preamble to this resolution. [See pp. 12-13 *infra*.]

4. That the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. That if the said Adam Clayton Powell does not present himself to take the oath of office on or before March 13, 1967, the seat of the 18th District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.¹⁸

The report and proposed resolution of the Select Committee were presented to the House on March 1, 1967.¹⁹ Although notice of this submission had been published in the Congressional Record,²⁰ Mr. Powell did not appear in the House on March 1. The House extensively debated the proposed resolution, considering, *inter alia*, whether age, citizenship, and inhabitancy were the sole grounds for exclusion from membership in the House; whether the House should first seat Mr. Powell and then determine whether to punish or expel him; and whether a two-thirds vote would be required to exclude him on the basis of the Select Committee's findings. At the conclusion of debate, the House rejected, by a vote of 222 to 202, a motion to bring the resolution to an immediate vote. Mr. Curtis, of Missouri, offered an amendment to the Committee resolution; the thrust of the amendment was to exclude Mr. Powell and declare his seat vacant. At this point The Speaker ruled that a majority vote would be sufficient to pass the resolution

¹⁸*Id.* at 34.

¹⁹The relevant proceedings on March 1, 1967, are found at 113 Cong. Rec. H 1918-57 (daily ed. March 1, 1967).

²⁰113 Cong. Rec. D 108 (daily ed. Feb. 24, 1967).

if so amended.²¹ After further debate this amendment was adopted by a roll call vote of 248 to 176. The amended resolution was then agreed upon, 307 to 116. The Select Committee's proposed preamble was then adopted so that House Resolution 278, 90th Congress, 1st Session, in its final form read:

WHEREAS, The Select Committee appointed Pursuant to H. Res. 1 (90th Congress) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964 to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D. C. or the State of New York as required by law.

²¹ 113 Cong. Rec. H 1942 (daily ed. March 1, 1967). Mr. Curtis, speaking to his proffered amendment, stated:

During the debate on the resolution, for which this is a substitute, I advanced my own theory on what power was derived from the power of expulsion. I said that I felt the power of expulsion very clearly implied the right of exclusion. I do not see how anyone can argue very seriously against this implied power.

Also, if this is true, then in my own judgment exclusion would require a two-thirds vote.

Fourth, as Chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and, was conduct unworthy of a Member; Now, therefore, be it

RESOLVED, That said Adam Clayton Powell, Member-Elect from the Eighteenth District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress, and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.

Thereafter, Appellants brought the suit from which the present appeal derives. Because of its importance to the resolution of the issues here presented, some attention must be devoted to the nature of the present claims. By their own statement of this case, Appellants sued the Members of the present House of Representatives in a class action. Their complaint in the District Court named Representatives John W. McCormack; Carl Albert, Gerald R. Ford, Emanuel Celler, Arch A. Moore, Jr., and Thomas B. Curtis "individually and, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, as representatives of a class of citizens who are presently serving in the 90th Congress as members of the House of Representatives." Speaker McCormack was also named in his official capacity. The Clerk of the House of Representatives, the Sergeant-at-Arms and the Doorkeeper were each named individually and in their official capacities.

Appellants' complaint challenged the action of the House by claiming that "House Resolution No. 278 is null and void and in violation of the Constitution of the United States, in particular Article I, Section 2(2) thereof which sets forth the exclusive qualifications for membership in the House of Representatives," and also because "it vio-

lates Article I, Section 1 of the Constitution of the United States which provides that members of the House shall be elected by the people of each state." It further alleged that the House action violated the "basic rights" of the electors of the 18th Congressional District of New York and that, as non-white citizens, these electors were being denied their rights under the fifth, thirteenth, and fifteenth amendments, and, as females, certain of the electors were being denied their rights under the nineteenth amendment. The complaint also attacked House Resolution 278 as a bill of attainder, an ex post facto law and as cruel and unusual punishment. Appellants further asserted that the hearings conducted by the Select Committee violated the fifth and sixth amendments by denying "the elemental rights of due process, including but not limited to notice of charges, the right of confrontation of witnesses, effective representation by counsel who could cross-examine witnesses in regard to any matter alleged"

Appellants' complaint also challenged the actions of certain of the individuals here sued as follows. Speaker McCormack was alleged to have violated the fifth amendment in declaring a vacancy in the 18th Congressional District contrary to Article I, section 2(4), (5), section 3(6), (7) and section 5(2), and 2 U.S.C. § 8 (1964). The Speaker was also challenged for his refusal to administer the oath to Mr. Powell ("under color and authority of his office and the illegal and unconstitutional actions of the House of Representatives") and for his threat to exclude Mr. Powell from occupancy of his office space. The complaint further stated that the Clerk of the House threatened to refuse to perform the service for Mr. Powell to which a duly-elected Congressman is entitled, that the Sergeant-at-Arms refused to pay Mr. Powell his salary, and that the Doorkeeper threatened to refuse to admit Mr. Powell to the House Chamber.

We take special notice of the manner in which Appellants characterized their action: "this is a proceeding to restrain the enforcement, operation or execution of House Resolution No. 278 " The relief prayed for by the Appel-

lants was that a statutory three-judge court be convened, that it grant a permanent injunction restraining Appellees from executing House Resolution 278, and that it issue a permanent injunction restraining Speaker McCormack from refusing to administer the oath, the Clerk from refusing to perform the duties due a Member of the House, the Sergeant-at-Arms from refusing to pay Mr. Powell, and the Doorkeeper from refusing to admit Mr. Powell to the Chamber. The requested injunction would also restrain the named Representatives "and all other members of the class of citizens they represent who are members of the House of Representatives from taking any action to enforce House Resolution No. 278 or any other action which will deny to plaintiff Adam Clayton Powell, Jr., the right to be seated" The complaint also asked for declaratory judgment that the denial of his seat violated the Constitution. In addition, Appellants requested writs of mandamus to require Speaker McCormack to administer the oath of office and to compel the relief requested against the other named officials. Finally, Appellants requested preliminary injunctions granting similar relief pending adjudication of the claims.

After detailed pleading and arguments of counsel, the District Court denied Appellants' application for a three-judge court, dismissed the complaint "for want of jurisdiction of the subject matter," and denied the motion for a preliminary injunction. *Powell v. McCormack*, 266 F. Supp. 354, 360 (D. D.C. 1967). On April 27, 1967, this court denied Appellants' motion for summary reversal. Appellants' petition for writ of certiorari prior to judgment in this court was denied by the Supreme Court on May 29, 1967, *Powell v. McCormack*, 387 U.S. 933 (1967).

While these legal proceedings were pending Mr. Powell was re-elected to the House of Representatives on April 11, 1967. The formal certification of election was received by the House on May 1, 1967. Mr. Powell has not presented himself again to the House or asked to be given the oath of office.

Claims and Issues

The issues on this appeal raise profound questions of constitutional law which go to the very heart of our form of government of powers delegated to separate branches by a written constitution. Inextricable are fundamental aspects of our commitment to representative government with elected legislators responsible directly to the people.

Appellants contend:

- (a) that dismissal of the complaint in the District Court for want of jurisdiction was error;
- (b) that the claims are justiciable;
- (c) that refusal to seat Mr. Powell who was over twenty-five years of age, more than seven years a citizen and an inhabitant of New York violated Article I, sections 2 and 5 of the Constitution;
- (d) that House Resolution 278 inflicted on Mr. Powell a punishment in violation of the Constitution;
- (e) that Mr. Powell's exclusion from the House violated Due Process;
- (f) that Mr. Powell's exclusion from the House violated rights of the voters of his district to a free choice of their representative;
- (g) that federal courts have power to grant relief requested; and
- (h) that the District Court erred in refusing to certify the necessity for a three-judge court.

The Appellees contend:

- (a) that the Speech or Debate Clause of Article I is an absolute bar to the action;
- (b) that there is no federal subject matter jurisdiction;
- (c) that the complaint presents a political question; and
- (d) that the claims asserted are not justiciable.

Constitutional Provisions

Because we will have frequent occasion to refer to the text of certain constitutional provisions, we set out here some of the pertinent sections involved in this case:

Art. I, § 2, clause 2: "No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State in which he shall be chosen."

Art. I, § 5, clause 1: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide."

Art. I, § 5, clause 2: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

Art I, § 6, clause 1: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Art. III, § 2, clause 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;"

PART I
CAN THE COURT ACT?
JURISDICTION

Historically there have been at least two concepts of the exercise of federal jurisdiction. One is the classical concept that once jurisdiction was found, a court could not decline to act. In *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821), for example, Chief Justice Marshall articulated the view that:

We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2-9 (1959). A second view is that, where a court finds jurisdiction, it may nevertheless decline to exercise its power. L. HAND, *THE BILL OF RIGHTS* 14-18 (1958); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1923).²²

Much of what has been said and written on the concepts of jurisdiction, discretionary jurisdiction, justiciability, case or controversy, and political question, and any effort to fix firm boundaries defining these concepts, is now merged into

²²Both competing theories are discussed in BICKEL, *THE LEAST DANGEROUS BRANCH* 46-65 (1962). Professor Bickel himself comes very close to the second concept in his views on prudential techniques for avoiding the exercise of jurisdiction. Bickel, *Foreward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). A more thorough analysis is set forth in Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

a series of cases,²³ the most significant of which for our purposes is *Baker v. Carr*, 369 U.S. 186 (1962). Almost imperceptibly at first, but quite clearly by the 1962 holding in *Baker*, the Supreme Court had established more comprehensive guidelines for identifying federal subject matter jurisdiction and justiciability. Since the present case turns on a constitutional grant of power to a co-equal branch, the application of these guidelines will present what Mr. Justice Brennan termed in *Baker*, "a delicate exercise in constitutional interpretation," *id.* at 211.

When a court finds that the subject matter of the case is inappropriate for judicial consideration, *Baker* now establishes that it is nonjusticiable and the court declines to exercise admitted jurisdiction:

The District Court was uncertain whether our cases withholding federal judicial relief rested upon a lack of federal jurisdiction *or upon the inappropriateness of the subject matter for judicial consideration—what we have designated "nonjusticiability."* The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, § 2), or is not a "case or controversy" within the meaning of that section; or the cause is not one described by any jurisdictional statute.

Baker v. Carr, *supra*, at 198 (emphasis added).

²³ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Colegrove v. Green*, 328 U.S. 549 (1946); *Coleman v. Miller*, 307 U.S. 433 (1939).

The difficulties arising from the terms used on this elusive subject are suggested by the comments of other members of the Court in *Baker*. Mr. Justice Harlan, for example, described the majority holding as an "abrupt departure . . . from judicial history." He went on to note:

Once one cuts through the thicket of discussion devoted to "jurisdiction," "standing," "justiciability" and "political question," there emerges a straightforward issue . . . Does the complaint disclose a violation of a federal constitutional right . . . , a claim over which a United States District Court would have jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983? The majority opinion does not actually discuss this basic question, but, as one concurring Justice [Stewart] observes, seems to decide it "*sub silentio*." *Ante*, p. 261.

Baker v. Carr, *supra*, at 330-31 (Harlan, J., dissenting).

In *Baker*, where the Court was dealing with state action, what the Court said, perhaps as much as what it did, staked out something of the new dimensions of federal subject matter jurisdiction, justiciability, the political question and other doctrines. If *Baker* was, as Mr. Justice Frankfurter thought, "a massive repudiation of the experience of our whole past," *id.* at 267 (dissenting opinion), it is a holding which points the way for us as to the issues of jurisdiction and justiciability.

Mr. Justice Brennan in *Baker* enumerated three criteria each of which must be present to establish the existence of federal subject matter jurisdiction:

- (1) the cause must "arise under" the Federal Constitution, laws, or treaties (or fall within one of the other enumerated categories of Article III, section 2), and
- (2) the cause must be a "case or controversy" within the meaning of Article III, section 2, and
- (3) the cause must be described in a jurisdictional statute enacted by Congress.

Id. at 198.

1. *Arising Under the Federal Constitution.*

Subject to congressional enactment, Article III, section 2, grants federal courts jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;" In 1875 Congress used similar language in a statute granting federal courts general and original jurisdiction over such cases. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. See 28 U.S.C. § 1331(a) (1964). A commentator has recently noted that:

[t]he key phrase, both in the Constitution and in the statute, is "arises under." Though the meaning of this phrase has attracted the interest of such giants of the bench as Marshall, Waite, Bradley, the first Harlan, Holmes, Cardozo, and Frankfurter, and has been the subject of voluminous scholarly writing, it cannot be said that any clear test has yet been developed to determine which cases "arise under" the Constitution, laws, or treaties of the United States.

C. WRIGHT, *FEDERAL COURTS* 48 (1963).

Appellants' complaint in the District Court is predicated on the several Article I powers of the House, Article III, and on the Bill of Rights and Civil Rights Amendments. Neither the litigants nor the District Court²⁴ challenged the substantiality and importance of the constitutional claims, one of the most significant factors in the determination of subject matter jurisdiction.²⁵ Thus, leaving for subsequent discussion

²⁴ *Powell v. McCormack*, 266 F. Supp. 354, 355-56 (D. D.C. 1967).

²⁵ Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were "so attenuated and unsubstantial as to be absolutely devoid of merit," *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, or "frivolous," *Bell v. Hood*, 327 U.S. 678, 683. That the claim is unsubstantial must be "very plain." *Hart v. Keith Vaudeville Exchange*, 262 U.S. 271, 274.

Baker v. Carr, *supra*, at 199 (footnote omitted).

the question of whether the case "arises under" in the context of the statutory grant of jurisdiction, this case would appear to present a substantial claim which arises "directly" under the Constitution,²⁶ and thus "arises under" in the context of the constitutional grant of jurisdiction of Article III. This conclusion is fortified by the broad reading given to Article III by Chief Justice Marshall in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846-58 (1824). See WRIGHT, *supra*, at 48-52; Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 649 (1942).

Appellees argue that the issue presented by this case arises exclusively and finally under Article I, section 5, and thus the case is withdrawn from the judicial power articulated in Article III. Their argument, which has the support of various contemporary constitutional authorities,²⁷ is that the text of the Constitution—"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members"—carved out from the Article III judicial powers all jurisdiction of the courts to review congressional judgment under this clause. Stated in another way, Appellees' argument is that the Constitution assigned this special kind of judging function to the Legislative Branch.²⁸ If so, it is the Constitution's allocation of powers that requires this result, rather than any failure of the claim to arise under the Constitution. Article III grants judicial power to cases "arising

²⁶ Mishkin, *The "Federal Question" in the District Courts*, 53 COLUM. L. REV. 157, 165-68 (1953).

²⁷ See Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36 (E. Cahn ed. 1954); Scharpf, *supra* note 22, at 539-40; Wechsler, *supra*, at 8.

²⁸ Appellees' argument finds its logical basis in the classical theory of judicial review previously discussed. Under that view, as Professor Wechsler noted, the primary question is whether the Constitution commits the "autonomous determination" of the issue to another coordinate branch. Wechsler, *supra*, at 7-9.

under" the Constitution *as a whole*, not under any particular provision of it.

2. *Case or Controversy.*

It is clear from the debates at the Philadelphia Convention that the Framers intended Article III's requirement of "case or controversy" to mean cases or controversies "of a judiciary nature." *E.g.*, 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (rev. ed. 1966). Analysis of English and Colonial precedents shows that after a long and bitter struggle judicial bodies were denied the power of review over legislative judgments concerning elections and qualifications of members. *See* 1 H. REMICK, THE POWERS OF CONGRESS IN RESPECT TO MEMBERSHIP AND ELECTIONS 1-62 (1929); *see generally* M. CLARK, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES (1943); C. WITKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE (1921). Nothing at the Convention suggests that the "case or controversy" language of Article III was intended to change this familiar and historical allocation of powers. *See* 2 M. FARRAND, *supra*, at 39, 132-33, 186. Indeed, where departures from English precedents were intended they were explicitly written into Article III; for example, the provision extending judicial power to include cases in equity, 2 *id.* at 428.

No cases have been cited as directly holding, and our search has not revealed any basis for saying, that a claim to a seat in the House is of a kind traditionally the concern of courts in the sense, for example, that Mr. Justice Frankfurter viewed traditional cases as those which English courts dealt with at the time of our Convention, *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring); *see Atlas Life Ins. Co. v. W.I. Southern, Inc.*, 306 U.S. 563, 568 (1939). All traditions must have a genesis, however, and legal traditions are no exception. One might view *Bond v. Floyd*, 385 U.S. 116 (1966), for example, as departing from existing federal traditions when it found jurisdiction over a state legislator's claim

to his seat. It is interesting, however, that nowhere in the opinions of the three-judge *Bond* court is there any discussion of "case or controversy." *Bond v. Floyd*, 251 F.Supp. 333 (N.D. Ga. 1966). Nor did the Supreme Court opinion in *Bond* elaborate on the "case or controversy" aspect. The presence of a case or controversy was seemingly taken for granted or decided sub silentio. The same is true in *Baker v. Carr*. Although *Baker* explicitly tabulates "case or controversy" as one of three indispensable factors for jurisdiction, nowhere in that opinion is there any discussion indicating just how the reapportionment of state electoral districts fell within the scope of matters "of a judiciary nature."²⁹ Yet the holding plainly assumes that a case or controversy was presented.

Against this background we can hardly conclude that Mr. Powell's claim to a seat in the House fails to present a case or controversy as those terms must now be construed.

3. *Statutory Grant of Jurisdiction.*

Even where the requisites of Article III, section 2 are met—that is, the claim presents a case or controversy which "arises under" the Constitution or laws of the United States—jurisdiction of federal courts is dependent on an affirmative grant by Congress. U.S. CONST. art. III, § 1; *Baker v. Carr*, *supra*, at 198; *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

Our examination of the various jurisdictional statutes relied upon by Appellants reveals that jurisdiction can be based only on 28 U.S.C. §1331(a) (1964),³⁰ the relevant provision:

²⁹The Court merely stated: "Our conclusion . . . that this cause presents no nonjusticiable 'political question' settles the only possible doubt that it is a case or controversy." *Baker v. Carr*, *supra*, at 198.

³⁰Appellants also rely on the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1964), and the Three Judge Court statute, 28 U.S.C. § 2282 (1964), but it is clear that these statutes are not jurisdictional. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950) (declaratory judgment); *Cadillac Publishing Co. v. Summerfield*, 97 U.S. App.D.C. 14, 227 F.2d 29, *cert. denied*, 350 U.S. 901 (1955) (same); *Van Buskirk v. Wilkinson*, 216 F.2d 735 (9th Cir. 1954) (three judge

of which is: "The district courts shall have original jurisdiction of all civil actions . . . [which arise] under the Constitution, laws, or treaties of the United States." Although there is a paucity of legislative history for the statute, see generally FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65-69 (1927), commentators agree that a broad grant of jurisdiction was intended. Mishkin, *supra* note 26, at 160; Chadbourn & Levin, *supra*, at 644-45 (1942); Forrester, *The Nature of a "Federal Question,"* 16 *TULANE L. REV.* 362, 374-85 (1942). We have already determined that this case "arises under" for the purposes of the Article III definition of judicial power. While section 1331 is not to be equated with the potential for federal jurisdiction in Article III, see, e.g., *Zwickler v. Koota*, 389 U.S. 241, 246-47 n.8 (1967), and cases cited therein, we conclude that the statute is broad enough to operate as an affirmative jurisdictional grant here. See, e.g., *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-14 (1936); Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 *MICH. L. REV.* 17, 39-45 (1947).³¹

court). The civil rights statutes relied upon, 42 U.S.C. §§ 1971(a)(1), 1981, 1983 (1964), and 42 U.S.C. § 1971(a)(2) (1964), as amended, § 15, 79 Stat. 445 (1965), are not applicable because they deal either with state action or with specific acts of voter discrimination which are not alleged to have been involved here. Appellants' final jurisdictional predicate, 28 U.S.C. § 1343(4) (1964) is equally unavailing. To the extent that it might confer jurisdiction as to *federal* deprivation of civil rights protected by Acts of Congress, those very acts, we have just noted, are not applicable here.

³¹ Appellees argue that 28 U.S.C. § 1344 (1964), conferring jurisdiction to recover possession of office but excluding the office of Representative in the House, plainly denied jurisdiction in cases like this. See *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), *cert. denied*, 336 U.S. 904 (1949). That statute, however, is limited to election disputes. In addition, it requires that the sole question involved arise out of the denial of voting rights on account of race, color or servitude.

PART II

SHOULD THE COURTS ACT?
JUSTICIABILITY-DISCRETION TO ACT

Having found that under *Baker* jurisdiction arises, we now turn to the inquiry as to the appropriateness or inappropriateness of the subject matter of Appellants' claims for judicial consideration. Absent federal subject matter jurisdiction there would be nothing on which a court could act, but "in the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather the court's inquiry necessarily proceeds" to determine whether a duty and its breach can be identified and determined and a remedy molded. *Baker v. Carr, supra*, at 198.

Appellees argue that the cause presents on its face a "political question."³² But the fact that a claim seeks the enforcement of a political right or a claim to political office, as here, does not necessarily mean that it raises a "political question." See, e.g., *Bond v. Floyd, supra*. The term "political" has been used to distinguish questions which are essentially for decision by the political branches from those which are essentially for adjudication by the judicial branch.

For other dismissals based on lack of a jurisdictional statute see *Peterson v. Sears*, 238 F. Supp. 12 (N.D. Iowa 1964) (suit to enjoin voting officials from unlocking voting machines after congressional election); *Keogh v. Horner*, 8 F. Supp. 933 (S.D. Ill. 1934) (suit for writ of prohibition against Governor's issuance of certificate of election of Congressman).

³²The standard authorities on the nature of a "political question" are: Frank, *supra* note 27, at 36-43; POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1936); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1926); McCloskey, *Foreward: The Reapportionment Case*, 76 HARV. L. REV. 54, 59-64 (1962); Scharpf, *supra* note 22; Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

In some areas the political question can be readily discerned; for example, the conduct of foreign policy is vested exclusively in the Executive, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), whereas the power to declare war or raise armies is vested in the Congress, U.S. CONST. art. 1, § 8. Even in these areas questions can arise on the peripheries so that the labels of "foreign policy" or "state of war" are not automatic barriers to all judicial scrutiny, e.g., *The Three Friends*, 166 U.S. 1, 63-66 (1897); *Baker v. Carr*, *supra*, at 212-13, and cases cited therein. No purpose would be served in pursuing delineation and we refer to it only to indicate that the law does not pivot on labels, even those of constitutional origin.

Appellees stress the applicability of a series of cases containing language indicating that the exercise of congressional power to judge the qualifications of Members is beyond the scope of the judicial power, i.e., the courts have no jurisdiction at all. In the cases cited to us, either the issue of jurisdiction was never reached³³ or the language relied upon is dictum.³⁴ Nevertheless, we note that they treat this congressional power as exclusive.³⁵

³³E.g., *Seymour v. United States*, 77 F.2d 577, 584 (8th Cir. 1935).

³⁴*Reed v. County Commissioners*, 277 U.S. 376, 388 (1928); *Jones v. Montague*, 194 U.S. 147, 153 (1904); *Johnson v. Stevenson*, 170 F.2d 108, 110 (5th Cir. 1948), *cert. denied*, 336 U.S. 904 (1949); *Application of James*, 241 F. Supp. 858, 860 (S.D. N.Y. 1965); *Peterson v. Sears*, 238 F. Supp. 12, 13-14 (N.D. Iowa 1964); *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934); *In re Voorhis*, 291 Fed. 673, 675 (S.D. N.Y. 1923).

In three of these cases, *Johnson*, *Peterson*, and *Keogh*, the decision was based on lack of an appropriate jurisdictional statute.

³⁵For state cases to a similar effect see *Laxalt v. Cannon*, 80 Nev. 588, 397 P.2d 466 (1964); *In re Williams' Contest*, 198 Minn. 516, 270 N.W. 586 (1936).

The only holding of this court which bears directly on the issue is *Sevilla v. Elizalde*, 72 App. D.C. 108, 112 F.2d 29 (1940). In *Sevilla*, a resident of the Philippine Commonwealth sought a bill in equity to enjoin the resident commissioner of the Philippines from holding office because he lacked the requisite qualifications. The qualifications were specified in the Independence Act which provided for the resident commissioner to have a seat but no vote in the United States House of Representatives. The court characterized his role partly as a diplomatic resident of a "foreign" state and partly as a territorial delegate to Congress. Noting that the question of the qualifications of foreign diplomats was committed to the Executive, and the question of the qualifications of a delegate was committed to Congress, this court held that the case presented a political question:

Courts have no jurisdiction to decide political questions. These are such as to have been entrusted by the sovereign for decision to the so-called political departments of government, as distinguished from questions which the sovereign has set to be decided in the courts.

* * *

Article I, section 5 of the Constitution provides that "each house shall be the judge of the elections, returns and qualifications of its own members." . . . And the Supreme Court has recognized that although these powers are judicial, as distinguished from legislative or executive, in type, they have nevertheless been lodged in the legislative branch by the Constitution.

Id. at 111, 116, 112 F.2d at 32, 37. The *Sevilla* holding standing alone might well be dispositive of the instant appeal but it must be read in light of cases since then culminating in *Baker*.

The Supreme Court case on which the *Sevilla* court relied in reaching its conclusion is *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929). There a Senate investigation into the election of a Senator involved the subpoena of a witness to testify as to the source of campaign contributions. He refused and the Senate ordered him

arrested and brought to the Chamber. The Supreme Court held that the Senate had the power to bring a witness before it by arrest warrant pursuant to the exercise of its power to judge the qualifications of its Members.³⁶ More importantly, the Supreme Court noted that the power to judge encompassed the power to "render a judgment which is beyond the authority of any other tribunal to review," *id.* at 613. See Mr. Justice Douglas' concurring opinion in *Baker v. Carr*, *supra*, at 242 n.2: "Of course each House of Congress, not the Court, is 'the Judge of the Elections, Returns and Qualifications of its own Members.'"

Nonjusticiability of a question because it is found to be essentially political is declared by *Baker* to be a doctrine peculiar to confrontations within the *federal* establishment and derives from the fundamental structure of our system of divided and separate powers.³⁷ In *Baker* and *Bond* any possible confrontation was between federal power and a state. Cautiously avoiding any attempt to state the exclusive criteria for identifying a political question, Mr. Justice Brennan in *Baker* suggested six factors to be found "prominent on the surface" of a political question case. They bear restatement:

- [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- [2] or a lack of judicially discoverable and manageable standards for resolving it;

³⁶ In *Barry* the Senate was not judging qualifications in the sense here involved but inquiring into whether, because of fraud and illegal conduct of the candidate, no "election" had been held.

³⁷ [I]n the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

Baker v. Carr, *supra*, at 210. See McCloskey, *supra* note 32, at 62.

Luther v. Borden, 48 U.S. (7 How.) 1 (1849); is the foremost of the guaranty clause cases. Although the dispute there arose within a state, the court focused on the potential conflict between the federal judicial power and the obligation of the legislative and executive branches to fulfill the guaranty clause.

[3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

[4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

[5] or an unusual need for unquestioning adherence to a political decision already made;

[6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, *supra*, at 217.

Treating these as "symptoms" of a nonjusticiable political question, rather than as the exclusive criteria for identifying one, we turn to their application to this record, having in mind that under *Baker* the presence of any one of these six factors may be a bar to justiciability. This much *Baker* has settled. ³⁷

(1) Article I, section 5 of the Constitution would seem in plain terms to vest in the House "a textually demonstrable constitutional commitment of the issue" of a judging function concerning the elections, returns and qualifications of its own Members. The language that "Each House shall be the judge" can hardly mean less than that the Members, for this purpose, become "judges," withdrawing judging of qualifications from the judicial branch.

Mr. Powell and the class Appellants contend that what was textually committed to the House by Article I, section 5, was the narrow power to judge whether a Member-elect met the Article I, section 2, criteria of age, citizenship and inhabitancy and no more. On its face, section 5 commits the power to judge qualifications to the House *in some measure*.³⁸ Although it may not be necessary to decide whether

³⁸ Deciding whether a matter has *in any measure* been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional inter-

the power is confined to section 2 criteria or limited in some other respect, it is clear that a general power of judging has been committed by the Constitution to the House. If other factors, now to be considered, render the claims inappropriate for consideration, we need not rely on what seems to be a textual commitment.

(2) Are there "judicially discoverable and manageable standards for resolving" the issues raised? Laying aside for the present the availability of an efficient judicial remedy, it would be difficult to say that there are no "manageable standards" for adjudicating the issues raised. Familiar judicial techniques are available to construe the meaning of Article I, section 2, criteria of age, citizenship, and inhabitancy and to decide whether these are the sole grounds on which a Member-elect may constitutionally be excluded. The language of *Baker*, "manageable standards for resolving" the claims, must, however, be read in light of the earlier formulation inquiring "whether protection for the right asserted can be judicially molded." When we consider whether the available "manageable standards" are adequate for resolving the question in the sense of solving and settling it, we are forced to conclude that courts do not possess the requisite means to fashion a meaningful remedy to compel Members of the House to vote to seat Mr. Powell or to compel The Speaker to administer the oath.

(3) This case does not present aspects to which the third criterion of *Baker* applies since the determination of the scope of a constitutional grant of power is not an "initial policy determination of a kind clearly for non-judicial discretion," such as a declaration of war.

(4) It is difficult to see, assuming a decision favorable to Mr. Powell, that there could be an efficient judicial resolution which was contrary to the action of the House "with-

pretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Baker v. Carr, supra, at 211 (emphasis added).

out expressing lack of respect due coordinate branches of government." Appellants urge that the courts should not concern themselves with the prospect of a direct confrontation because Members of the House, or a majority of them, would as a matter of comity, respect a holding of this court and abide by its rulings. The issue is not, however, what reaction could be expected from the coordinate branch, but the nature of the judicial mandate requested. Assuming that the House would yield, this does not show that our mandate would not indicate disrespect for a coordinate branch.

(5) There does not seem to be present, except as it arises out of paragraphs (1) and (4) above, "an unusual need for unquestioning adherence to a political decision already made." This fifth criterion of *Baker* has no direct relevance here as it would for example to a specific foreign policy determination within the scope of Executive power. See, e.g., *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Eminente v. Johnson*, 124 U.S.App. D.C. 56, 361 F.2d 73, cert. denied, 385 U.S. 929 (1966); *Pauling v. McNamara*, 118 U.S.App.D.C. 50, 331 F.2d 796 (1963); cert. denied, 377 U.S. 933 (1964).

(6) There is, in only a limited sense, and perhaps not at all in the sense contemplated by *Baker*, a "potentiality of embarrassment from multifarious pronouncements by various departments on one question." However, if we view the risk of conflicting pronouncements by the House and the courts as within this criterion, the potential for embarrassment is rather obvious. A judicial mandate to seat Mr. Powell would in effect be a command to The Speaker to administer the oath contrary to the terms of House Resolution 278. The command to seat Mr. Powell might be obviated were we to hold that our mandate constituted an "equity substitute" for a resolution of the House, the effect of which would be to treat him as having been sworn and seated. But the resulting confusion from such conflicting pronouncements seems clear.

It would therefore appear that not one but probably several of the *Baker* "symptoms", of nonjusticiability are prominent on the surface of the claims asserted and indeed are inextricable from them; this alone might well be sufficient to warrant a conclusion of "the inappropriateness of the subject matter for judicial consideration." *Baker v. Carr*, *supra*, at 198. *Baker*, it will be recalled, emphasizes the difference between jurisdiction and justiciability. After stating that the distinction "is significant," the Court noted:

In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding *whether the duty asserted can be judicially identified, its breach judicially determined, and whether protection for the right asserted can be judicially molded.*

Ibid (emphasis added).

If we read "duty" and "breach" in the conventional judicial sense, good arguments can be advanced that we can judicially identify the asserted duty of the House to seat a qualified Member-elect, and that a breach of such a duty can, in the abstract, be judicially determined. We will assume, *arguendo*, that these hurdles are cleared. However, when we come to the next inquiry, "whether protection for the right asserted can be judicially molded," we are confronted with problems quite different from and indeed not present in adjudications of conventional equitable claims or claims involving state action. Although Professor Wechsler was not pointing to precisely the problem we have here, his characterization of political questions is apropos: "what is crucial . . . is not the nature of the question but the nature of the answer that may validly be given by the courts." Wechsler, *supra*, at 15.

In *Baker*, the Supreme Court concluded that protection for the rights arising under the equal protection clause could be molded, saying "we have no cause at this stage to doubt

the District Court will be able to fashion relief” *Baker v. Carr, supra*, at 198. No further elucidation of this is found in the Court’s opinion. The only other reference to the scope and mechanics of the relief to be molded is the comment of Mr. Justice Douglas that “any relief accorded can be fashioned in the light of well-known principles of equity.” *Id.* at 250 (Douglas, J., concurring opinion).

Can the District Court mold relief which will protect the rights here asserted? Looking first to the complaint in the District Court, we find that after the prayer for a three-judge court, the complaint asks judgment:

- (1) to enjoin execution of House Resolution 278;
- (2) to require The Speaker of the House to administer the oath to Mr. Powell;
- (3) to enjoin all Members of the House from any action to enforce Resolution 278 or otherwise to deny Mr. Powell his seat;
- (4) for declaratory judgment declaring House Resolution 278 null and void;
- (5) for injunctive and mandatory relief addressed to non-elected employees of the House relating to access to the House, pay, and other perquisites of the office of a Member.

Any judgment which enjoined execution of House Resolution 278, or commanded the Speaker of the House to administer the oath, or commanded Members of the House as to any action or vote within the Chamber would inevitably bring about a direct confrontation with a co-equal branch and if that did not indicate lack of respect due that Branch, it would at best be a gesture hardly comporting with our ideas of separate co-equal branches of the federal establishment. These circumstances would give rise to a classic political question and fall within the definition of such a question under *Baker*. On this record, therefore, the claims of Appellants for coercive equitable relief are inappropriate for judicial consideration.

*Appropriateness of Subject Matter
for Declaratory Relief*

Although we have determined that we cannot mold relief in coercive form, we next consider Appellants' claims for a declaratory judgment independent of the coercive equitable relief sought.³⁹ Cf. *Zwickler v. Koota*, 389 U.S. 241, 253-54 (1967). The Declaratory Judgment Act provides:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201 (1964).⁴⁰

A declaratory judgment is *sui generis*, neither strictly legal nor equitable, *United States Fidelity & Guar. Co. v. Koch*, 102 F.2d 288, 290-91 (3d Cir. 1939). In common with equitable relief, however, it recognizes judicial competence to declare rights without imposing a duty to do so, i.e., its exercise is discretionary. *Public Affairs Associates, Inc. v.*

³⁹One of the reasons, not present here however, that declaratory relief should be considered independently of other relief is the fact that coercive relief "looks only to some immediate need, whereas the declaration of rights, by clarifying the legal relations, has prospective value in stabilizing the legal position" BORCHARD, *DECLARATORY JUDGMENTS* 433 (2d ed. 1941).

⁴⁰All authorities agree that the purpose of a declaratory judgment is to settle actual controversies before they ripen into violations of law or breaches of duty and to afford relief from uncertainty and insecurity by a "premature" adjudication. See, e.g., BORCHARD, *supra* note 39, at 299; *Luckenbach S.S. Co. v. United States*, 312 F.2d 545 (2d Cir. 1963); *Scott-Burr Stores Corp. v. Wilcox*, 194 F.2d 989 (5th Cir. 1952).

Rickover, 369 U.S. 111, 112 (1962).⁴¹ It is clear that this discretion must be exercised judiciously and cautiously, with regard for the circumstances of the case and the purpose of a declaratory judgment. The Supreme Court recently noted:

[T]he propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness *informed by the teachings and experience concerning the functions and extent of federal judicial power.*

Public Serv. Comm'n v. Wykoff, *supra* note 41, at 243 (emphasis added). Some of the same factors which led us to hold that judicial consideration of the claims was not appropriate, dictate a holding that we decline to undertake declaratory relief. Declaratory relief in this case is particularly inappropriate since it could not finally terminate the controversy,⁴² indeed, it might well tend to resurrect the very conflict our holding of inappropriateness seeks to avoid.⁴³ Our conclusion is reinforced by Mr. Justice Frankfurter's opinion in *Colegrove v. Green*, 328 U.S. 549 (1946), which, although modified in other aspects by *Baker* and its progeny, remains relevant with respect to the discussion of declaratory judgments:

⁴¹See *Zemel v. Rusk*, 381 U.S. 1 (1965); *Public Serv. Comm'n v. Wykoff Co.*, 344 U.S. 237 (1952); *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942); *Lampkin v. Connor*, 123 U.S.App.D.C. 371, 360 F.2d 505 (1966); *Marcello v. Kennedy*, 114 U.S.App.D.C. 147, 312 F.2d 874 (1962), *cert. denied*, 373 U.S. 933 (1963).

⁴²*Cf. Ch  -Toine Hotel Apartments Bldg. Corp. v. Shogren*, 204 F.2d 250, 258 (7th Cir. 1953); *United States v. Jones*, 176 F.2d 278, 280 (9th Cir. 1949).

⁴³See *Sellers v. Johnson*, 69 F. Supp. 778, 786 (S.D. Iowa 1946), *rev'd on other grounds*, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948); *Doehler Metal Furniture Co. v. Warren*, 76 U.S. App.D.C. 60, 129 F.2d 43 (1942) (*dictum*).

And so, the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy "would be justiciable in this Court if presented in a suit for injunction. . . ." *Nashville C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 262.

Id. at 551-52. See also *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1934); 6A MOORE, FEDERAL PRACTICE ¶ 57.14, at 3078 (2d ed. 1964) ("The Declaratory Judgment Act does not attempt, nor can it be used to avoid this fundamental judicial principle: [political questions].").

The Claims of Voters

We cannot be unmindful of the claims which relate to the highly important constitutional rights to vote and to be represented by the choice reflected by the voting process. These are by no means unimportant claims. The "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); see *Wesberry v. Sanders*, 376 U.S. 1, 13 (1964). The right of all voters who meet a state's qualifications to vote is protected by the Constitution and by congressional acts, *Ex Parte Yarbrough*, 110 U.S. 651 (1884); *United States v. Classic*, 313 U.S. 299 (1941), and the qualifications established by the states may not discriminate either in terms of race or color, U.S. CONST. amend. XV, or in terms of sex, U.S. CONST. amend. XIX, or by weighing unfairly the votes of those in one geographical area or electoral district over the votes of others, e.g., *Wesberry v. Sanders*, *supra*.

The rights so protected, however, relate to the initial right to vote—the right to say who shall be the representative. They do not directly extend to the right to have that particular representative be seated in Congress under all circumstances. The Constitution itself, as we have noted earlier, sets explicit limits on the right of electors to have whom-ever they choose sit in Congress: it fixes eligibility require-

ments of age, citizenship and inhabitancy in Article I, section 2; additionally Congress can determine the times, places and manners of holding the elections under Article I, section 4; and Congress is granted exclusion and expulsion powers. Certainly these provisions make clear that the carefully guarded right to vote for whomever the elector desires does not necessarily carry with it a concomitant right to have that person seated in the Congress. In *United States v. Classic*, *supra*, the Court made clear that the right is not absolute: "That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in §§ 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted," *id.* at 316 (emphasis added).⁴⁴

We have already noted that the holding in *Bond v. Floyd*, *supra*, was bottomed on state action which imposed a penalty on Bond for exercising his first amendment rights to discuss public issues. The Supreme Court's rationale would apply equally if Bond had been excluded from the state university

⁴⁴We think the language of the court in *Barry v. United States ex rel. Cunningham*, *supra*, while not directly dealing with the right to vote as here developed, is relevant to the relationship between the power of Congress to exclude or expel and the right of a citizen to vote:

The equal representation clause is found in Article V which authorizes and regulates amendments to the Constitution, "provided, . . . that no state, without its consent, shall be deprived of its equal suffrage in the Senate." This constitutes a limitation upon the power of amendment and has nothing to do with a situation such as the one here presented. The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion.

because of his speeches. The Court did not reach the question of the standing of Bond's constituents to assert claims on their own behalf. *Id.* at 137 n.14. The class Appellants have not argued their claims in terms of first amendment rights, but lurking in the language of the Court in *Bond* can be detected some hint of a possible relationship between first amendment rights to political expression and the related right of voters to have their views articulated for them in Congress.⁴⁵ —

The essence of representative government is the one speaking for the many; hence the rights of those who are to be represented must always be accorded high standing and any infringement must be carefully scrutinized. Nevertheless, we have seen that even this crucial right is hedged in by various restrictions which arise out of the Constitution itself. The same Constitution which guarantees the right to expression and the right to vote also limits the powers of courts.

The right to vote is not an academic right; its primary objective is frustrated when the person elected cannot assume the powers and responsibilities of office. Nevertheless, the subject matter of Mr. Powell's claim and the voting claims of the class Appellants are so interrelated that neither can be regarded as having an existence entirely independent of the other; in the context of this case, they stand or fall together. It must follow that as Mr. Powell's claims

⁴⁵The germ of this concept can be found in the language of the Court in *Bond* that a legislator's speech is protected so that the people may hear from their legislator and "also so they may be represented in government debates by the person they have elected." *Bond v. Floyd*, *supra*, at 136-37. See also Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 254; Comment, 35 U. CHI. L. REV. 151, 170-72 (1967).

are inappropriate for judicial consideration, so also are those of the class Appellants.

Our conclusion that the subject matter of the suit is inappropriate for judicial consideration is not inconsistent with the conclusion of Judge Hart. *Powell v. McCormack*, 266 F. Supp. 354 (D. D.C. 1967). He found that the subject matter embraced a "political question" under *Baker* and relied on this to conclude that there was no jurisdiction. Our application of *Baker* leads to the conclusion that the presence of a "political question" does not invariably preclude jurisdiction but rather affords a basis for declining to exercise it. The decisions of the District Court and of this court both are bottomed on concepts of separation of powers.⁴⁶

⁴⁶ As I read the concurring observations of my colleagues, a majority agrees on the essential holdings that (a) the court has jurisdiction, (b) the claims in this case are inappropriate for judicial consideration, and (c) a three-judge court was not required. *Baker* is definitive, it is recent, and it is authoritative; and there is no need to press beyond the new outer limits it establishes for jurisdiction, justiciability and political questions. I do not express a view as to whether exclusion may be accomplished for reasons outside section 2 criteria, nor do I rely on *the fact* that more than two-thirds of the House voted for Resolution 278 in its final form. The Speaker had made a ruling that a simple majority was sufficient and it is the essence of speculation to place any reliance on the quantum of the vote as actually cast. The Speaker ruled that Members were voting on exclusion, not on expulsion. The contention which merges exclusion and expulsion powers seems to me part of what is inappropriate for judicial consideration.

PART III

THE SPEECH OR DEBATE CLAUSE

Appellees treat the Speech or Debate Clause under their argument on jurisdiction and urge that it bars any court from questioning Members of the House of Representatives, individually or collectively, with respect to legitimate legislative activities and that this includes the exercise of their constitutional responsibility to vote on the seating of a Member-elect. Treatment of this claim has been deferred because it is not entirely clear whether it goes to jurisdiction or some other bar to granting the relief sought. For our purposes we need not resolve that classification. Since two of the four Supreme Court holdings on the Clause are barely two years old the point commends itself to consideration.

The Clause confers personal immunity on each Member of the House but it is not strictly a personal right since its purpose is to protect the legislative process in our system of representative government. The broad sweep of the bar is suggested by what the Supreme Court said about a legislator's burdens of responding to and defending a suit growing out of his legislative activities in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951):

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for public good. . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazards of a judgment against them based on a jury's speculation as to motives. (Emphasis added.)

The language of Article I, section 6, clause 1 is simply that "for any Speech or Debate in either House they [Members] shall not be questioned in any other Place." That Clause had its genesis in the English Bill of Rights proclaimed

by the Parliament of 1688-89.⁴⁷ The struggles arising in England were re-enacted in the American colonies where immunity for acts within the legislative chambers was asserted by the colonial lawmakers, see *JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1727-1740*, at 242 (1910); see generally, M. CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 93-97 (1943). Indeed, the Supreme Court as recently as 1951 noted that "[f]reedom of speech and action in the legislature was taken as a matter of course

⁴⁷"That the freedom of speech, and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parylament." 1 Will. & Mary s. 2, c.2 (1689), reprinted in T. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 449, 451 (Plucknett ed. 1960).

The privilege of freedom of speech and debate was first included in the Speaker's petition to the King requesting certain Parliamentary privileges in 1541. An earlier indication of this privilege occurred during the reign of Richard II, when a member of Parliament who had introduced a bill containing reflections upon the King's extravagance was condemned to death. In a subsequent reign, the member's petition to annul the judgment on the ground that it was introduced and debated in Parliament was granted. C. WITTKE, *THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE* 23-24 (1921).

As is pointed out in *United States v. Johnson*, 383 U.S. 169, 182-83 n. 13 (1966), language similar to that ultimately codified in 1688 was adopted in a statute of 1513, 4 Henry VIII, c. 8, as a result of the prosecution of Strode, a member of the House of Commons, for introducing certain mining legislation in which he had a personal interest. All of the early cases reveal a struggle between privilege and prerogative—between the King and Parliament or its members whom the King believed to be meddling in non-Parliamentary affairs. The struggle reached culmination in the prosecution of Eliot and other members of Commons for making seditious speeches and conspiring to restrain the Speaker from adjourning the session. The defendants pleaded Strode's Act but the court held it to be a private bill. *Eliot's Case*, 3 How. St. Tr. 294, 309 (1629). Thereafter, in 1667, Parliament declared Strode's Act to be a general law. See T. TASWELL-LANGMEAD, *supra*, at 246-50, 377-78.

by those who served the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, *supra*, at 372.⁴⁸

So well known and accepted was this legislative immunity doctrine that the records of the Constitutional Convention show it was written into Article I without opposition or debate.⁴⁹ The objectives of the delegates can be gleaned from the writings of James Wilson, perhaps the most influential member of the Committee on Detail which drafted the provision for the convention:

In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense.

2 WORKS OF JAMES WILSON 421 (McCloskey ed. 1967).

The scope of the Clause has been challenged in the Supreme Court four times. First, in *Kilbourn v. Thompson*,

⁴⁸That the privilege was firmly embedded in English practice is revealed from Blackstone's writings:

For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti* It will be sufficient to observe that the whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere.

1 BLACKSTONE'S COMMENTARIES *163.

⁴⁹The first notation of the Clause comes from a document in James Wilson's handwriting, considered by the Committee on Detail. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 156 (rev. ed. 1966). Subsequent documents contain the first full expression of the Clause as it was reported to the convention and adopted. 2 *id.* at 166, 181, 246.

103 U.S. 168 (1880), the plaintiff, a recalcitrant witness before a House committee, was arrested and imprisoned by the Sergeant-at-Arms pursuant to a resolution of the House. The Supreme Court held that, although the imprisonment of Kilbourn was indeed unlawful, the Speech or Debate Clause constituted a bar to civil claims against the Speaker and the Members of the House, *id.* at 205.⁵⁰

It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to *resolutions* offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.

Id. at 204 (emphasis added).

Tenney v. Brandhove, 341 U.S. 367 (1951), was the second case to come before the Supreme Court on the Speech or Debate Clause. Brandhove was called to testify before a state legislative committee and when he refused to respond was held in contempt. The Supreme Court relied upon the general doctrine of legislative immunity, reflected in Article I, to insulate the members of the state legislature from suit. The opinion focused on the historical immunity of legislators from civil or criminal liability for their exercise of the privileges of speech and debate, within the sphere of legitimate legislative activity. *Id.* at 377-78.

In the third case to reach the Supreme Court, *United States v. Johnson*, 383 U.S. 169 (1966), a former Congressman challenged his conviction for violation of federal conflict

⁵⁰The Court remanded the case as to the officers of the House, and plaintiff eventually recovered against them, *Kilbourn v. Thompson*, 11 Dist. Col. (MacArthur & Mackey) 401 (1883).

of interest laws and conspiracy, asserting the immunities of the Clause. The conspiracy count was based in part on a speech delivered by him in the House, for which the Congressman was found to have received substantial sums of money claimed by the prosecution to be a bribe. The Fourth Circuit reversed and phrased the issue in terms of jurisdiction.

This is the first case, within our knowledge, squarely raising the question whether the congressional privilege deprives a court of jurisdiction to try a member on a criminal charge of accepting money to make a speech in the House of which he is a member.

337 F.2d 180, 186 (4th Cir. 1964).

In affirming the Fourth Circuit the Supreme Court accepted the linkage of the Article I Clause with the English and Colonial precedents, characterizing its adoption into Article I as a culmination of the

history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators.

383 U.S. at 178. That the Clause must be "read broadly to effectuate its purposes," is made abundantly clear:

[T]he privilege was not born primarily of a desire to avoid private suits such as those in *Kilbourn* and *Tenney*, but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary.

Id. at 181. The Supreme Court did not discuss the claim of Johnson in jurisdictional terms.⁵¹

⁵¹The entire thrust of the opinion suggests that the holding rests on the fact that a criminal indictment charged a Member of the House with conduct basely motivated—"precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry," *United States v. Johnson*, 383 U.S. 169, 180 (1966). If Appellants' claims are read as asserting that the votes of the House Members were racially motivated it is clear that the Supreme Court views motives

The most recent of the four cases involving the Clause is *Dombrowski v. Eastland*, 387 U.S. 82 (1967). This court affirmed summary judgment for the defendants in a suit against a Senate Committee Chairman and its chief counsel for injunctive relief and damages flowing from an alleged conspiracy between the defendants and Louisiana state officials to seize property and records of the petitioners in violation of their fourth amendment rights. *Dombrowski v. Burbank*, 123 U.S.App.D.C. 190, 358 F.2d 821 (1966) (per curiam). The Supreme Court affirmed as to the Committee Chairman. It reversed and ordered a new trial only as to the chief counsel:

It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881), that legislators engaged "in the sphere of legitimate legislative activity," *Tenney v. Brandhove*, *supra*, 341 U.S., at 376, should be protected not only from the consequences of litigation's results *but also from the burden of defending themselves*.

387 U.S. at 84-85 (emphasis added).

If the Members of the House who are Appellees here cannot be "questioned in any other Place," it would seem that they need not *answer* in any other place, including courts. From this it is arguable that had the class defendants elected to ignore the complaint, the District Court might have had an obligation to apply *sua sponte* the bar of the Clause; however, we need not decide that point.

of legislators, however unworthy, as irrelevant. Mr. Justice Frankfurter's statement in *Brandhove* is sweeping:

The claim of an unworthy purpose does not destroy the [Speech or Debate] privilege. . . . The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U.S. 423, 455.

Tenney v. Brandhove, *supra*, at 377.

Having in mind the breadth accorded the Clause in *Kilbourn*, *Tenney* and *Dombrowski*, and the "prophylactic purposes of the clause," *United States v. Johnson*, *supra*, at 182, it would seem that, however characterized, the Clause operates as a bar to the maintenance of this suit.⁵²

PART IV

THREE JUDGE COURT

In their complaint in the District Court, Appellants applied for the convening of a three-judge court pursuant to 28 U.S.C. § 2282 (1964).⁵³ The District Court denied the application on the ground that a resolution of one House, such as House Resolution 278, excluding Appellant Powell from the House was not an "Act of Congress" within the meaning of the statute. *Powell v. McCormack*, 266 F. Supp. 354, 355 (D. D.C. 1967). *Cf. Krebs v. Ashbrook*, 275 F. Supp. 111, 118 (D. D.C. 1967).

The District Court's conclusion is amply supported by the plain meaning of "Act of Congress" as used in the statute and by the legislative history and purpose of section 2282. The decided cases demonstrate that

[t]he legislative history of § 2282 and of its complement, § 2281, requiring three judges to hear injunc-

⁵²In both *Kilbourn* and *Dombrowski* money damages were sought and officers of the House and Senate were held not to share the absolute immunity accorded Members. In the instant case Appellants seek, not money damages, but extraordinary coercive equitable relief against employees of the House directly contrary to commands of the House itself.

⁵³Section 2282 provides: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

tive suits directed against federal and state legislation, respectively, indicates that these sections were enacted to prevent a federal judge from being able to paralyze totally the single operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963) (footnote omitted). See *Zemel v. Rusk*, 381 U.S. 1, 7 n.4 (1965); *Phillips v. United States*, 312 U.S. 246, 248-51 (1941). The legislative purpose is not served by construing the statute to cover the resolution in this case since the statute is to be construed narrowly. *Bailey v. Patterson*, 369 U.S. 31, 33 (1962). House Resolution 278 is a resolution of one House only and relates to the organization and internal governing of the House of Representatives. It creates no broad statutory scheme which would be frustrated by injunctive relief, and it does not contain the attributes of the usual "Act of Congress" which involves the House of Representatives, the Senate, and the President.⁵⁴

⁵⁴ Although there are no direct holdings in point, prior case law supports the District Court's conclusion. In *Krebs v. Ashbrook*, 275 F. Supp. 111 (D. D.C. 1967), Rule XI of the House of Representatives, the charter of the House Un-American Activities Committee, was held not to be an "Act of Congress" within the meaning of the statute. *Contra Stamler v. Willis*, 371 F.2d 413 (7th Cir. 1966).

Since we predicate our holding on the absence of an Act of Congress as required by the statute, we are not required to reach the alternative grounds suggested by Appellees, that even assuming that House Resolution 278 is an Act of Congress, a single district judge may dismiss the action for lack of federal jurisdiction. See *Lion Mfg. Co. v. Kennedy*, 117 U.S.App.D.C. 367, 330 F.2d 833 (1964); cf. *Reed Enterprises v. Corcoran*, 122 U.S.App.D.C. 387, 354 F.2d 519 (1965).

CONCLUSION

Our disposition of this appeal on the ground that the claims are nonjusticiable because of the inappropriateness of the subject matter for judicial consideration, makes it unnecessary to reach the claims on the merits. Nevertheless, some mention of the conflicting views is appropriate.

Debate on the scope and meaning of Article I, sections 2 and 5 began at Philadelphia and has engaged the attention of legal writers, including Members of both Houses, ever since. As with the debates over other issues arising under the Constitution, this debate has not been and possibly never will be judicially resolved. To vest in the members of a legislative body the powers intimated in the literal language of section 5 "to be the Judge" of matters as significant as the exclusion and expulsion of members plainly involves risks. Professor Chafee parades some of the horrendous possibilities which from time to time have been suggested:

If it [Congress] can add crime or disloyalty acts as bars, it can add profiteering as well. . . . A majority . . . can raise the minimum age to fifty . . . bar men of Jewish race, . . . require that members must be already enrolled in either the Republican or the Democratic Party, or recognize only a single party entitled to nominate candidates. There is no line to be drawn; once the legislature is allowed to cross the constitutional limits. It can turn our democracy into an oligarchy by imposing high property qualifications; or into a dictatorship of the proletariat by declaring ineligible all persons deriving income from rents and invested capital.

Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 255 (1942). But Professor Chafee acknowledges that there is much to be said for the view that requirements other than those of section 2 must be embraced in the less precise language of section 5 that each House is to be "Judge" of the qualifications of its Members. He concludes by saying that neither of the extreme views, *i.e.*, no exclusion power except for section 2 reasons, or unrestricted exclusion powers, is sound and that the actual practice and usage has long taken an intermediate ground.

As to elected persons satisfying all the requirements in the Constitution, we are not forced to choose between giving the House absolute power to unseat whomever it dislikes, and giving the voters absolute power to seat whomever they elect. A third alternative has been adopted, fairly close to the second view. The constitutional qualifications ordinarily suffice; but Congress has rather cautiously imposed some additional tests by statute,^[55] and the House of Representatives or the Senate has probably added a very few more qualifications by established usage (a sort of legislative common law) to cover certain obvious cases of unfitness.

Id. at 257.

Great reliance is placed by Appellants on the views of Professor Charles Warren, another constitutional writer. Professor Warren views section 2 as fixing the only qualifications for membership in the House. Referring to the Convention's refusal to adopt "the proposal to give Congress power to establish qualifications in general [or adopt] . . . the proposal for a property qualification," he concludes:

Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship, and residence. For certainly it did not intend that a single branch of Congress should possess a power which

⁵⁵ Professor Chafee's reference to a "statute" is not followed by any citation. It may be that he had reference to a statute enacted in the Civil War period prescribing an oath of past loyalty, Act of July 2, 1862, ch. 128, 12 Stat. 502, or to a statute which forever renders a Senator, Representative, department head, or other officer of the government incapable of holding office under the United States if such person receives compensation for services in any matter in which the government is a party, Act of June 11, 1864, ch. 119, 13 Stat. 123; see *Burton v. United States*, 202 U.S. 344 (1906).

the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius excusio alterius* would seem to apply.

C. WARREN, *THE MAKING OF THE CONSTITUTION* 421 (1937) (footnote omitted).

The protagonists for the conflicting views on the scope of exclusion powers of the House draw on the various aspects of history, custom and usage which support their respective positions.⁵⁶ Most of this, of course, is addressed to what are the merits of the claims asserted by Appellants. Reference to these unresolved constitutional questions is made in order to indicate their scope and nature and to underscore what it is that we do not decide.

Conflicts between our co-equal federal branches are not merely unseemly but often destructive of important values. In the interpretation of provisions which are pregnant with

⁵⁶E.g.; Z. CHAFEE, *supra*, at 241-69; C. WARREN, *supra*, at 412-26; Wechsler, *supra*, at 8. Background historical material is set forth in 1 BLACKSTONE'S COMMENTARIES *162-63, *175-77; M. CLARKE, *supra*, at 174-205, 236-62; THE FEDERALIST NO. 60, at 409 (Cooke ed. 1961) (Hamilton); J. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES* 171-204 (1963); C. WITTKE, *supra*, at 55-74, 90-171. The relevant English cases, including the famous case of John Wilkes, are found in GLANVILLE, *REPORTS OF CERTAIN CASES DETERMINED AND ADJUDGED IN PARLIAMENT* (1776).

The instances in which the House of Representatives considered exclusions or expulsions are found in 1 A. HINDS, *PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* 381-591 (1907); 2 A. HINDS, *supra*, at 795-860; 6 C. CANNON, *PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* 50-63 (1935). See Hupman, *Senate Election, Expulsion and Censure Cases*, S. DOC. NO. 71, 87th Cong., 2d Sess. (1962); 1 H. REMICK, *supra*, at 116-332.

such conflicts the unavailability of a remedy and the consequences of any unresolved confrontation between coordinate branches weigh heavily in pointing to a conclusion either that no jurisdiction was intended or that if jurisdiction exists it should not be exercised.

The checks and balances we boast of can check and balance just so far. The Framers had hard choices in many areas. To allow, for example, total immunity for speech, debate and votes in the Congress risked irreparable injury to innocent persons if false or scurrilous charges were made on the floor of a Chamber; to allow the Executive exclusive power of foreign relations risked unwise policies which could lead to war; to tolerate the essential supremacy of constitutional interpretation in a Supreme Court meant the risk of unwise decisions by a transient majority. But that is the way our system is constructed. Under stress what some may think are weaknesses turn out to be strengths and the wisdom of Framers in dividing the spheres of delegated power becomes clear.

That each branch may thus occasionally make errors for which there may be no effective remedy is one of the prices we pay for this independence, this separateness, of each co-equal branch and for the desired supremacy of each within its own assigned sphere. When the focus is on the particular acts of one branch, it is not difficult to conjure the parade of horrors which can flow from unreviewable power. Inevitably, in a case with large consequences and a paucity of legal precedents, the advocates tend to raise the spectre of the hypothetical situations which would be permitted by the result they oppose. Our history shows scant evidence that such dire predictions eventuate and the occasional departures in each branch have been thought more tolerable than any alternatives that would give any one branch domination over another. That courts encounter some problems for which they can supply no solution is not invariably an occasion for regret or concern; this is an essential limitation in a system of divided powers. That courts cannot *compel* the

acts sought to be ordered in this case recedes into relative insignificance alongside the blow to representative government were they either so rash or so sure of their infallibility as to think they should command an elected co-equal branch in these circumstances.

We should resist the temptation to speculate whether and under what circumstances courts might find claims to a seat in Congress which would be justiciable. We do well to heed the admonition of Mr. Justice Miller, uttered nearly a century ago, that judges confine themselves to the case at hand:

It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate.

Kilbourn v. Thompson, supra, at 204-05.

The judgment appealed from is

Affirmed.

McGOWAN, *Circuit Judge, concurring separately*: My colleagues and I reach a common result, that is to say, (1) a three-judge court was not required for the reasons stated by Judge Burger, and (2) we do not think it either necessary or appropriate to direct the District Court to reinstate the complaint and to determine after trial whether the particular relief sought should be given. Because this second determination involves considerations peculiarly committed to judicial discretion, it is not surprising that, although our identification and weighing of relevant factors presents some overlap, each of us has preferred to characterize in his own words the route he has travelled.¹

This record demonstrates to me that, from the beginning, Representative Powell's view of the Constitution has explicitly and continuously been that, so long as he possesses the requisite qualifications of age, citizenship, and inhabitancy, his right to serve in the House is solely a matter between him and his constituents, not his colleagues. If the voters of his district do not like his conduct in office, they can turn him out at the next election; or, if that conduct be thought violative of the criminal laws, the proper authorities can seek indictments. But, so his reasoning proceeds, for his colleagues to make that conduct the occasion for severance of their association together in the House would be, without observance of the amending process, to add further qualification requirements to the three now stated in the Constitution.

¹ For example, the allegedly exclusive power of the House to pass upon the fitness of a member, and the claimed reach of the Speech and Debate Clause, have played no part whatsoever in my vote. I do not profess to know what their precise constitutional meaning is, nor do I say that they are wholly without relevance to a discretionary declination of jurisdiction. I simply have not found it necessary to take them into account in my determination.

Thus it was that, although the Select Committee expressly informed him that the scope of its inquiry included both (1) his qualifications in terms of age, citizenship, and inhabitancy, and (2) alleged misconduct in office warranting expulsion or other punishment, he persistently refused to answer any questions or supply any information except with respect to (1). Somewhat belatedly, he sought to fortify his legal position by asserting that the Committee could, at most, take up (2) only after he had been seated, even though he was at the moment of that claim continuing to receive full pay and other allowances and emoluments. But there is no reason to think that, had the Committee deferred the second aspect of its inquiry until after seating, his basic constitutional position would have been abandoned.

In the context of the kind of misconduct in office involved here,² I regard that position as untenable. In saying this, I distinguish very sharply between conduct abusing the privileges of House membership, on the one hand, and status or speech, on the other. If the House were to withhold recognition of a member because of his race, or religion, or political or philosophical views, there would indeed have been an addition to qualifications without benefit of constitutional amendment. But the allegations in the complaint which suggest that this is such a case are so purely conclusory in

²It is argued that the misconduct cannot be assumed because Powell was denied procedural due process by his colleagues in the investigation of his activities. But no one can read the record of the Select Committee's relationships with Powell without concluding that there was no serious purpose upon Powell's part to participate in the ascertainment of the facts. This was unquestionably due to his fundamental constitutional theory that he was accountable for his conduct only to his constituents. One cannot escape the impression that any procedural problems would have been resolved satisfactorily if there had been willingness to accept the relevance of the alleged misconduct to his continuance in the House. Against this background, I see no need to reinstate the complaint solely to pursue the procedural issues.

character as, under elemental pleading concepts, not to require a hearing on the merits.

Appellant Powell's cause of action for a judicially compelled seating thus boils down, in my view, to the narrow issue of whether a member found by his colleagues, after notice and opportunity for hearing, to have engaged in official misconduct must, because of the accidents of timing, be formally admitted before he can be either investigated or expelled. The sponsor of the motion to exclude stated on the floor that he was proceeding on the theory that the power to expel included the power to exclude, provided a 2/3 vote was forthcoming. It was.³ Therefore, success for Mr. Powell on the merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade.

³It is true that the Speaker, after inquiry to the Parliamentarian, announced that the motion would carry on a majority vote. All this suggests to me is that, in this instance, Representative Curtis was a better parliamentarian than the Parliamentarian. In any event, the result conformed to the more exacting standard; and for me to guess whether the result would have been different if the Speaker's ruling had been different would be to engage in the speculation Judge Burger deplores (fn. 46).

As to Judge Burger's implication that I have gotten into the merits, I note only that he, having decided that the words of the Constitution vest in the House the power to judge a member's fitness, concludes that jurisdiction may be declined to review its exercise in this instance. I, having read the text of the Constitution as declaring a power in the House to expel a member for misconduct in office by a 2/3 vote, conclude that jurisdiction may be declined to pursue the narrower question of whether the Constitution requires that the House must first seat before it expels. It would appear that each of us has, preliminarily to concluding whether jurisdiction must be exercised, gone no further in deciding questions of "textual commitment" than is contemplated by the majority opinion in *Baker v. Carr*.

Our already overtaxed courts arguably have more pressing work to do than this, including the hearing and determination of serious and substantial claims of deprivations of civil rights. The only question really presented by this complaint is whether the House must go through the formality of seating a member before it *expels* him for official misconduct. Unlike the District Court, I am prepared to say that even such a narrow issue confers subject-matter jurisdiction in the familiar sense of (a) a claim arising under the Constitution, (b) a case or controversy, and (c) a statute founding jurisdiction. But the Supreme Court in *Baker v. Carr* was at pains to make clear that the *existence* of jurisdiction does not invariably require its *exercise*. The question is one of whether, under all the circumstances and with a wise regard for the nature and capabilities of judicial power and for the respect it must always command, the court is bound to hear and determine a complaint on its merits.⁴

The challenged action by the House in this case reflects in substance an equation by it of its power to expel for legislative misconduct by a 2/3 vote with a power to deny seating for the same reason and by the same vote. That action was rooted in the judgment of the House as to what was necessary or appropriate for it to do to assure the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government. That is a judgment which, on this record, presents no impelling occasion for judicial scrutiny.

⁴The factors that are relevant to this kind of a determination obviously include the nature of the relief sought—in this case, injunction, mandamus, and declaratory judgment. All have traditionally been regarded as reposing peculiarly in the discretion of the court and as subject to denial, even after hearing on the merits, for reasons unrelated to the merits. The potential embarrassments and confusions, both within the House and between it and the judicial and executive branches, inevitable upon their grant in this case are worthy of sober remark. These and like matters are legitimately the setting in which are to be considered the urgencies, in terms of simple justice, of the bringing to bear of judicial power.

LEVENTHAL, *Circuit Judge*. I concur in the result. Judge Burger's opinion presents the background of this case in detail. I agree with some aspects of his opinion—particularly the conclusions in Part I and Part IV. As to other aspects, I am either in disagreement or find it unnecessary to define my position. It would unduly protract and delay our disposition for me to make a point by point analysis. Accordingly I confine myself at this time to a relatively sparse, almost topic-sentence, statement of my approach, as follows:

1. The complaint on its face presents a matter within the subject-matter jurisdiction of the District Court. It alleges a claim arising under the Constitution, there is a case or controversy, and there exists a Federal statute giving district courts jurisdiction to consider such a case, namely, 28 U.S.C. § 1331. The fact that this is a novel law suit does not negative jurisdiction. *Baker v. Carr*, 369 U.S. 186 (1962).

2. I do not feel required to decide appellees' contention that the case lacks justiciability, a concept that I think was developed in *Baker v. Carr* as defining the kind of case or issue that is inherently inappropriate for determination by any court.

For example, I am not prepared to say at this juncture that a complainant charging an unconstitutional exclusion from Congress avowedly put on racial or religious grounds cannot obtain a declaratory judgment or other relief. Nor do I consider whether appellant Powell may have available other judicial remedies.

3. In my view the issue presented by the complaint is of such a nature that dismissal is appropriate in the exercise of sound judicial discretion.

Plaintiffs were seeking remedies—mandamus; equity decree; declaratory judgment—each of which is not necessarily automatically available to one asserting (and even establishing) the underlying right. In an action seeking such remedies a

court has discretion in deciding whether, when and how far to consider the merits.¹

4. For present purposes I assume appellants are correct in their assertion that Article I, Section 5, Cl. 1 of the Constitution is exclusive in stating conditions of eligibility for Congressmen. But that does not mean that appellant Powell was immune from exclusion on grounds that would justify expulsion under Article I, Section 5, Cl. 2.

The record before us shows that the exclusion by the House of appellant Powell was by a vote of 307 to 116, on a motion put forward by its sponsor, Congressman Thomas Curtis of Missouri, on the ground that Mr. Powell's conduct was such as to warrant his expulsion under Article I, Section 5, Cl. 2 of the Constitution if he were seated, and that he should therefore be excluded at the outset.

Certainly members of the House, who cannot be questioned in court for action taken within a "sphere of legitimate legislative activity,"² can, without being subject to

¹See *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962).

²*Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), quoted in *Dombrowski v. Eastland*, 387 U.S. 82, 84, 85 (1967), confirms the principle inherent in separation of powers that such action is not subject to judicial scrutiny or cognizance.

Compare the rule establishing immunity from suit of judges of courts of general jurisdiction, considered a fundamental requirement of an independent judiciary. *Bradley v. Fisher*, 12 Wall. (80 U.S.) 335, 351 (1871), holds that such judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." The Court also stated (pp. 351-52): "Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." In *Piereson v. Ray*, 386 U.S. 547, 554 (1967) the Court referred with approval to *Bradley v. Fisher*, and referred to the historic immunities of judges and legislators as "equally well established."

court disapproval, expel a member they find to have mis-used travel credit cards, and kept on his payroll a person (his wife) who resided neither in his District nor in the District of Columbia. The fact that the House is not a court, with power to enter a judgment of conviction for violation of laws, does not preclude it from concluding that the pertinent acts were committed by the Congressman, as a part of an ultimate determination of lack of fitness for service in the House, a determination entrusted to the House by Article 1, Section 5, Clause 2 of the Constitution.

5. Appellant Powell seems to have been of the view that whatever grounds the House may have had to expel him once he was seated, they could not be used as grounds to exclude him without seating him.

On this point I think that in a case like Powell's where the record (including reports of legislative committees) provides abundant indication that there was at least a substantial question of misconduct in Congressional office, the view of Congressman Curtis was permissible under the Constitution, and appellants' contention to the contrary must be rejected.

As to the interim period, I am at least reassured by the provision in H. R. Res. 1 of the 90th Congress, 1st Sess., adopted after debate in which Mr. Powell participated, that pending the investigation and report by the Select Committee and House action thereon Mr. Powell was to receive the pay, allowances and emoluments authorized for Members of the House, though he was not to be sworn in or occupy a seat in the House.

As to the right of the other appellants to be represented during the interim period, they stand on no higher ground than the claim of appellant Powell to be seated.³

³See *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 616 (1929): "The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the

Appellants say in rebuttal, *inter alia*, that the theory advanced by Congressman Curtis is not available to appellees since the House did not accept the need for a 2/3 vote, which Mr. Curtis recognized as essential. The Speaker announced, on a parliamentary inquiry, that only a majority vote was required for exclusion of appellant Powell.

This contention is not without force. But assuming, *arguendo*, that the procedure used to exclude Powell may have been improper that does not mean he is entitled to maintain an action for discretionary relief of a nature that brings a court close to confrontation with members of the coordinate legislative branch of government. Thus, a court may decline to entertain an action based on such a procedural defect unless it appears not only that the defect may have been prejudicial but also that it probably was prejudicial, at least where as here the relief sought is extraordinary.

6. The fact that the House voted exclusion by a 2/3 vote is not irrelevant, even assuming the majority ground rule was improper, for it at least generates a substantial doubt that a court declaration would provide Powell his seat—even assuming as I think we should, that the House would respect the court's declaratory judgment. *Compare Bond v. Floyd*, 385 U.S. 116 (1966). The House could immediately exclude on the same ground, by the same vote.

True, the House could do this, by hypothesis, only if the "ground rule" were that a 2/3 vote was necessary. But it does not appear that appellant Powell ever staked his position on the need for a 2/3 ground rule.

7. It is significant that appellant Powell, though duly re-elected in April 1967, has not availed himself of the legislative remedy available with this re-election to assert his claim to represent his district.

exercise of a constitutional power and no more deprives the state of its 'equal suffrage' in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion."

On the argument for stay Powell's counsel indicated that at least one reason, and apparently a major reason, why appellant Powell did not invoke that legislative remedy is that it would not maintain his seniority and chairmanship. Perhaps so, but a court would be going to the extreme edge of its authority if it were to declare his status as a Congressman. It cannot reasonably be asked to provide such extraordinary relief to enable complainant to obtain perquisites, however important, that are essentially a matter for legislative determination, and certainly are not assured by any constitutional clause. A court has a duty, in the sound exercise of discretion, to consider litigation seeking relief that raises problems of confrontation with a coordinate branch with an approach that will, wherever possible, confine relief narrowly.

8. If Powell had acquiesced in the premise that there was authority to exclude, but only by a 2/3 vote and 2/3 ground rule, there would likely have been a very different kind of legislative situation. He could not consistently have stood on the position that the House and its Select Committee were acting beyond the proper sphere of authority by considering matters other than age, citizenship and residence. He may have been unwilling to wage battle even on a 2/3 ground rule after a hearing that admittedly was warranted in inquiring into various financial and salary arrangements. The premise of permissible exclusion would have undercut the position that permitted him to defer as a matter of principle any explanation of those arrangements.

9. The various objections lodged by appellant Powell to the procedure of the House Committee must all be viewed in the light of his then position that the Committee's scope was restricted to the three issues of age, citizenship and residence. It cannot be assumed that procedural differences would have loomed as large, or been unmanageable, if appellant Powell had accepted what I think was a valid premise of the House and its Committee. That premise—which I uphold by a ruling on the merits on this issue—is that the

Constitution gives the House legislative "jurisdiction," even prior to seating a member-designate, to make inquiry as to whether he has committed acts justifying punishment or expulsion of a member.

10. My approach may not hang tidily on the pegs of jurisprudence thus far called to my attention. It makes sense to me, however, and labels and concepts can emerge in due course.

What seems to have received most discussion in recent years is the concept of justiciability as a requirement in addition to subject-matter jurisdiction. As I read them the discussions of justiciability and non-justiciability have emerged primarily in terms of whether the issue is of a kind that lies within any province of any court at any time. I refrain from accepting absolutes about the case before us—to lay it down flatly either that no court may consider the issue and rule differently from the House, or that there may not be a state of facts that would properly call upon the District Court to grant declaratory and perhaps other relief. There are recent decisions indicating that when there is a determination of both subject-matter jurisdiction and justiciability for the issues, the courts are required to decide the issues and to vindicate the applicant's constitutional rights—to refrain from sidestepping this duty merely because the framing of judicial relief presents large difficulties,⁴ and to take cognizance of a case seeking declaratory relief even where an injunction cannot properly be obtained.⁵ By strict logic the same approach should apply when there is a hypothesis of justiciability or at least a disinclination to enter a ruling of non-justiciability. Yet there have been instances when the courts have bypassed crucial jurisdictional

⁴Wesberry v. Sanders, 376 U.S. 1 (1964).

⁵Zwickler v. Koota, 389 U.S. 241 (1967).

issues and disposed of cases on the merits.⁶ I think the spirit of those cases also justifies the course I follow of deciding the merits on one key point and yet refraining, in the exercise of discretion, a full adjudication on the merits.


The key point, to me, is that Congressman Powell erred in his assumption that his satisfaction of the Constitutional requirements (of residence, citizenship and age) meant that he had to be seated, and that grounds justifying expulsion could only be applied to those who had already been seated. My ruling on the merits of this Constitutional issue leads to the conclusion that the House had legislative jurisdiction to consider and appraise the activities and fitness of appellant Powell at the time he presented his credentials. It is not a full adjudication of the merits of the claim of appellant Powell that he was wronged. It does not necessarily mean either that the House acted properly when it failed to heed the ground rule of a 2/3 vote put forward by Congressman Curtis as the assumption of his motion to exclude, or that a court considering a different prayer for relief would be disabled from saying so upon a full consideration of Powell's case on its merits.

The case before us presents problems of confrontation with a coordinate branch and of molding relief. These are considerations that lead a court in some instances to find non-justiciability of the issue for any court.⁷ They may also properly be invoked, I think, as backdrop and perspective for a ruling to decline to provide a full adjudication on the merits, even assuming justiciability. My reasoning is that the confrontations would likely have evolved in a quite different way if appellant Powell had recognized a power to exclude on grounds of misconduct (albeit on 2/3 vote) and had conducted himself on this premise from the start. Hence I

⁶See, e.g., *Secretary of Agriculture v. Central Rtg. Ref. Co.*, 338 U.S. 604, 619-20 (1950); *Ex Parte Bakelite Corp.*, 279 U.S. 438, 448 (1929).

⁷*Baker v. Carr*, 369 U.S. 186 (1962).

do not think it mandatory for a court to consider and determine the constitutional issue as he has chosen to frame it, from an erroneous premise; and specifically, I think it proper to refrain from a full determination of the merits in a case where petitioner is seeking an extraordinary remedy yet has failed to invoke to the fullest extent the remedies and procedures available within the legislative branch.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, JR., *et al.*,
Petitioners,

v.

JOHN W. McCORMACK, *et al.*,
Respondents.

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

This case was here last year when petitioners unsuccessfully sought certiorari before judgment in the Court of Appeals.* In opposing that petition we suggested that, although important issues were involved, prior consideration by the Court of Appeals, as well as possible developments in the political process, might make it unnecessary for this Court to consider the case.**

We believe that suggestion has proven sound and that certiorari should again be denied. The result reached by the Court of Appeals was correct and in accordance with

* Petition for Writ of Certiorari Prior to Judgment in the Court of Appeals for the District of Columbia, *Powell v. McCormack*, 387 U. S. 933 (October Term 1966, No. 1386).

** Memorandum for Respondents in Opposition, *Powell v. McCormack*, 387 U. S. 933 (October Term 1966, No. 1386). This Court denied the petition.

the decisions of this Court, and time and the evolution of the political process have eliminated any practical occasion or reason for further review.*

Before amplifying these reasons for denial of the present petition, brief mention of the question presented and the circumstances in which it arises is appropriate. The question is simply:

Whether, in the circumstances of this case, involving a suit against Members and certain officers of the House of Representatives to compel them to seat a Member-elect whom the House voted to exclude for misconduct, the federal courts can or should review the action of the House and compel the Members to vote to seat the Member-elect.

The circumstances in which this question arises are fully and fairly stated by Judge Burger in the opinions below at pages 2 to 15 (hereinafter cited as Op.). No further statement is necessary, except to point out that the Statement in the petition at pages 5 to 15 (hereinafter cited as Pet.) is deficient in a number of respects. The most glaring examples are its failure to recognize or acknowledge that:

1. Mr. Powell's exclusion from the 90th Congress had its genesis in "events involving the alleged conduct of Member-elect Powell during earlier Congresses" (Op. 2), including the hearings and report

* Indeed, it does not appear that petitioners seriously contend otherwise. The voluminous petition totally ignores the considered opinions of the Court of Appeals. It does not even discuss the issues of nonjusticiability which all members of that Court found determinative. It argues instead the question of subject-matter jurisdiction (which the Court of Appeals resolved in petitioners' favor), and the merits (which the Court of Appeals appropriately held it should not reach because they were not justiciable).

of a subcommittee of the Committee on House Administration which contain extensive evidence of misuse of House funds and violation of law governing hire of clerks by Mr. Powell.*

2. Mr. Powell was accorded substantial procedural rights beyond those required by the Rules of the House (Op. 5-8). He chose not to avail himself of those rights solely because, in his view, the Select Committee had no jurisdiction to inquire into anything beyond his age, citizenship, and inhabitancy (Op. 6, 9-10). He failed to attend on March 1, 1967, when the House considered the report and proposed resolution of the Select Committee, although ample notice had been given (Op. 11).

3. Petitioners have not challenged the accuracy of the findings of misconduct made by the Select Committee and set forth in House Resolution 278 (such findings being to the effect that Mr. Powell's contumacious conduct toward the courts of New York had reflected adversely on the House and its Members, that he had improperly maintained his wife on his clerk-hire payroll, that he had permitted, and participated in improper expenditures of public funds for private purposes, and that he had refused to cooperate with the Select Committee and with a subcommittee of the House Administration Committee in their lawful inquiries).

4. Petitioners do not allege in their complaint that the exclusion of Mr. Powell rests on any grounds other

* See *Hearings Before the Special Subcomm. on Contracts of the House Comm. on House Administration Relating to the Investigation into Expenditures During the 89th Congress by the House Comm. on Education and Labor, and the Clerk-Hire Payroll Status of Y. Marjorie Flores, 89th Cong., 2d Sess. (1967)*; H. R. REP. No. 2349, 89th Cong., 2d Sess. (1967).

than the findings of the Select Committee as set forth in House Resolution 278.

5. After his exclusion, Mr. Powell was reelected on April 11, 1967, but has never presented himself and requested that he be given the oath of office (Op. 15), even though the Speaker clearly stated on two occasions that if Mr. Powell did present himself as a result of his reelection the House would then decide what action to take with respect to seating him.*

We turn now to the reasons why the petition for certiorari should be denied.

ARGUMENT

I. Certiorari Should Not Be Granted To Review a Judgment Based upon Correct and Unchallenged Grounds.

A. *The Result Below Was Correct and in Accordance with the Decisions of this Court.*

The members of the Court of Appeals, each writing separately, carefully considered the issues and reached a unanimous result—that although subject-matter jurisdiction existed, the case was nevertheless not appropriate for judicial consideration.

Although we believe the court below erred in finding subject-matter jurisdiction,** that issue is of no present significance since the court was clearly correct in concluding that this case is nonjusticiable in any event. The

* 113 CONG. REC. H1942 (daily ed. Mar. 1, 1967); 113 CONG. REC. H4869 (daily ed. May 1, 1967).

** It was recognized below that the question of subject-matter jurisdiction was far from open and shut. For example, Judge Burger stated (Op. 23):

"Analysis of English and Colonial precedents shows that after a long and bitter struggle judicial bodies were denied the power of review over legislative judgments concerning elections and qualifications of members. . . . Nothing at the Convention suggests that the 'case or controversy' language of Article III was

various reasons assigned by the members of the court below for reaching their unanimous conclusion are sound, are in accordance with the precedents of this Court, do not involve any new or novel principles, and are carefully limited to the circumstances of this case. Appropriately

intended to change this familiar and historical allocation of powers. . . .

"No cases have been cited as directly holding, and our search has not revealed any basis for saying, that a claim to a seat in the House is of a kind traditionally the concern of courts"

Nevertheless, Judge Burger felt that the "case or controversy" requirement of subject-matter jurisdiction had been assumed or decided without discussion in *Baker v. Carr*, 369 U. S. 186, and *Bond v. Floyd*, 385 U. S. 116.

However, those cases involved review of state action, not the constitutional allocation of power among the coordinate branches of the federal government; they are hardly to be taken as foreclosing the point, especially since this Court has recently said that the words "cases" and "controversies" have "an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast v. Cohen*; 36 U.S.L.W. 4601, 4604 (U. S. Sup. Ct. June 10, 1968). Article I, section 5 of the Constitution gives the House the power to judge the qualifications of its Members and, like the Senate's power to try an impeachment, is an "explicit exception to the general grant of judicial power to the courts in Article III." Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 540 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959). Accordingly, every court that has considered the judicial power of each house under article I, section 5, has concluded that it is a "power . . . to render a judgment which is beyond the authority of any other tribunal to review." *Barry v. United States ex rel. Cunningham*, 279 U. S. 597, 613; *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), cert. denied, 336 U. S. 904; *Sevilla v. Elizalde*, 112 F.2d 29 (D.C. Cir. 1940); *Application of James*, 241 F. Supp. 858, 860 (S.D.N.Y. 1965); *Peterson v. Sears*, 238 F. Supp. 12 (N.D. Iowa 1964); *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934); *In re Voorhis*, 291 F. 673 (S.D.N.Y. 1923).

Since the court below decided the issue of subject-matter jurisdiction in favor of petitioners, we are at a loss to understand why they devote a major portion of their argument to attacking the conclusion of the District Court that there was no subject-matter jurisdiction (Pet. 36-42). One would at least assume that petitioners would talk in terms of the issues as refined and resolved by the Court of Appeals and that they would not be heard to urge as a reason for certiorari a matter which was decided (erroneously, we believe) in their favor.

left for another day, should the occasion ever arise, are questions as to whether the House of Representatives is entirely immune from suit to compel it to seat a Member-elect.* Accordingly, there is no necessity or occasion for further review of this particular case.

All of this clearly emerges from the reasons the court below gave for ruling that the circumstances of this case make it inappropriate for judicial review:

1. *This case presents a nonjusticiable political question.*

Judge Burger's careful analysis (Op. 26-40) demonstrates that a nonjusticiable political question is present under the principles laid down in *Baker v. Carr*, 369 U. S. 186. Judge McGowan agreed, but with a somewhat different analysis (Op. 56 & n.3), and Judge Leventhal found it unnecessary to decide the point (Op. 58).

At least four of the six separate criteria enunciated in *Baker v. Carr*, 369 U. S. at 217, for identifying a nonjusticiable political question are present here in varying degrees:

First, although Judge Burger did not rely on the point (Op. 30-31), there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department". Thus, article I, section 5 gives each house the power to be the "Judge" of the "Qualifications of its own Members," a power which this Court has said is the

* As Judge Burger said (Op. 53):

"We should resist the temptation to speculate whether and under what circumstances courts might find claims to a seat in Congress which would be justiciable. We do well to heed the admonition of Mr. Justice Miller, uttered nearly a century ago, that judges confine themselves to the case at hand [his reference is to *Kilbourn v. Thompson*, 103 U. S. 168, 204-05]".

To the same effect see the statements of Judge McGowan (Op. 55-57) and of Judge Leventhal (Op. 58-60).

power to "render a judgment which is beyond the authority of any other tribunal to review", *Barry v. United States ex rel. Cunningham*, 279 U. S. 597, 613. To the same effect is Mr. Justice Douglas' concurring opinion in *Baker v. Carr*, where he said, 369 U. S. at 242 n.2:

"Of course each House of Congress, not the Court, is 'the Judge of the Elections, Returns, and Qualifications of its own Members'."

As Judge McGowan pointed out, the expulsion power in section 5 of article I also forms a basis for a textually demonstrable commitment of the issue to the House (Op. 56 n.3).*

Second, the prohibition directed by the Speech or Debate Clause against questioning of Members and the Privilege from Arrest Clause** bar effective enforcement of a court order against Members of the House with respect to their judgment that a Member-elect is not qualified. In this sense, there are no "judicially discoverable and manageable

* "Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member." U. S. CONST. art. I, § 5.

Whatever limitations article 1, section 2 arguably imposes upon the House's power to judge qualifications under article 1, section 5, it has never been disputed that the authority of the House to expel on the vote of two-thirds is committed solely to its discretion. In particular, there can be no dispute that the expulsion power can be exercised for a host of reasons relating to past and current misconduct. As this Court itself has stated:

"The right to expel extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U. S. 661, 669-70.

** "The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." U. S. CONST. art. I, § 6.

standards for resolving" the issue presented, for, as Judge Burger said, "[W]e are forced to conclude that courts do not possess the requisite means to fashion a meaningful remedy to compel Members of the House to vote to seat Mr. Powell or to compel The Speaker to administer the oath." (Op. 31)

Third and fourth, it is difficult to see, as Judge Burger observed, how there could be an efficient judicial resolution contrary to the action of the House "without expressing lack of respect due coordinate branches of government" or without creating "a potentiality of embarrassment from multifarious pronouncements by various departments on one question." (Op. 31-32)

These considerations intertwine with and reinforce each other, and together they lead inexorably to the conclusion that petitioners' claims for relief are inappropriate for judicial consideration. There is nothing new or novel in this conclusion. It is simply the result of applying the explicit principles of *Baker v. Carr* to the circumstances of this case.*

2. The "Speech or Debate Clause" bars this action.

As Judges Burger and Leventhal recognized (Op. 41-47, 59-60), the Speech or Debate Clause of article I, section 6, and the hospitable reading given to it by this Court in accordance with its prophylactic purposes, stand squarely in the way of maintaining this action.** See *Dombrowski v.*

* Indeed, the considerations relating to this result reflect the judicial doctrine of justiciability as most recently quoted by this Court. "Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen*, 36 U.S.L.W. 4601, 4605 (U. S. Sup. Ct. June 10, 1968).

** Judge McGowan did not find it necessary to pass on the Speech or Debate Clause (Op. 54 n.1).

Eastland, 387 U. S. 82; *United States v. Johnson*, 383 U. S. 169; *Tenney v. Brandhove*, 341 U. S. 367; *Kilbourn v. Thompson*, 103 U. S. 168.

Only last year this Court emphasized in *Dombrowski* that "legislators engaged 'in the sphere of legitimate legislative activity' . . . should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." 387 U. S. at 85. The action of the House challenged here—the exercise of its constitutional responsibility under article I, section 5—is certainly within the sphere of "legitimate legislative activity" under the precedents in this Court. The conduct protected in those cases as "legitimate legislative activity" encompassed alleged or proven activity which: (a) violated a criminal statute (*Johnson*); (b) deprived a private citizen of his right to freedom of speech (*Tenney*); (c) involved unlawful and unconstitutional seizure of private property (*Dombrowski*); and (d) even resulted in the illegal and unconstitutional incarceration of a private individual (*Kilbourn*). *A fortiori*, if such conduct is within the sphere of "legitimate legislative activity," the Members sued here should not be questioned in the courts for speaking to and voting on a resolution involving their express constitutional duty to pass on the qualifications and conduct of Members of the House. That would be so even if their action in excluding Mr. Powell were assumed to be wholly unwarranted and unconstitutional, which is far from the case as the court below indicated.*

* Nor can this action be maintained against the agents of the House named in the complaint. The attempt to bar them from implementing within the House the command of the House excluding Mr. Powell is a transparent effort to frustrate the broad immunity afforded by the Speech or Debate Clause. Petitioners have consistently recognized throughout that their suit is against the House itself. See, e.g., Op. 13.

3. *The relief requested should be withheld as a matter of sound judicial discretion.*

Although Judge Leventhal did not travel the political question route to arrive at the common conclusion of non-justiciability, he reached the same result on more conventional grounds (Op. 58-65). As he noted: the relief sought by petitioners—injunction, mandamus, and declaratory judgment—“is not necessarily automatically available to one asserting (and even establishing) the underlying right” (Op. 58); the courts have discretion, where such remedies are sought, to determine whether, when and how far to consider the merits, and their determination will not be disturbed unless an abuse of discretion is committed.* In the circumstances of this case—including the failure of Mr. Powell to invoke remedies and procedures available within the legislative branch following his reelection on April 11, 1967, the unchallenged evidence of misconduct on his part, and the confrontation between the courts and the House posed by the relief requested—it was no abuse of discretion for the court below to decline to proceed.

4. *Review would be a matter of form, not of substance.*

Judge McGowan (Op. 56-57) took an alternate and highly practical approach in concluding that judicial scrutiny was inappropriate. As he noted: the sponsor of the motion to exclude Mr. Powell had stated on the floor that he was proceeding on the theory that the power to exclude was part of the power to expel and required a two-thirds vote; and a two-thirds vote was obtained even after the Speaker announced that a majority vote would suffice.

* Judges Burger and McGowan also discussed the discretionary nature of the relief requested (Op. 35-37, 57 n.4).

Judge McGowan accordingly concluded that the "only question really presented by this complaint is whether the House must go through the formality of seating a member before it expels him for official misconduct," and that there was "no impelling occasion for judicial scrutiny" of that question "on this record," particularly since "success for Mr. Powell on the merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade." Judge Leventhal essentially agreed with this practical approach to the problem (Op. 60-63). In the circumstances of this case and in view of the broad perimeters of article 1, section 5 giving the House control of the conduct of its internal affairs, there can be no quarrel with this commonsense result—that it is inappropriate for the courts to consider whether the House, instead of excluding Mr. Powell by more than a two-thirds vote, should have first seated him before achieving the same result by expulsion.*

B. Petitioners Do Not Challenge the Grounds Supporting the Court of Appeals' Decision.

The petition does not challenge any of the foregoing reasons which led the court below to affirm the judgment dismissing the complaint. Nor does the petition argue that these reasons warrant review by this Court. Instead, the petition ignores the opinions below and argues* the merits (along with the issue of subject-matter jurisdiction which was decided in petitioners' favor). But nowhere does the petition discuss how the threshold issues of non-

* Equally inappropriate for judicial consideration is speculation that a two-thirds vote might not have been forthcoming if the Speaker had not ruled that a majority vote would suffice. See *United States v. O'Brien*, 88 S. Ct. 1673; *Arizona v. California*, 283 U. S. 423, 455.

justiciability, decided against petitioners in accordance with *Baker v. Carr*, *Dombrowski v. Eastland*, and other decisions of this Court, can be overcome in order to reach the merits. This approach of the petition is hardly responsible, and it leads reasonably to speculation whether petitioners have some purpose in mind other than seeking review in this Court.*

* Mr. Powell is a candidate for election to the 91st Congress this coming November; he won the Democratic nomination in the New York primary on June 18, 1968. N. Y. TIMES, June 20, 1968, at 40, col. 4.

Although this is not the occasion to discuss the merits, respondents wish to register their emphatic disagreement with the arguments on the merits advanced in the petition, and to point out:

(1) Petitioners' contention that age, citizenship, and inhabitancy are the exclusive qualifications for membership in the House takes too extreme a view. As Professor Chafee suggests, it is not necessary to choose between the two extremes which may be urged—i.e., that the House is limited to the requirements of age, citizenship, and inhabitancy, or that the House has unrestricted power to exclude—for actual practice and usage has long taken an intermediate ground:

"As to elected persons satisfying all the requirements in the Constitution, we are not forced to choose between giving the House absolute power to unseat whomever it dislikes, and giving the voters absolute power to seat whomever they elect. A third alternative has been adopted, fairly close to the second view. The constitutional qualifications ordinarily suffice; but Congress has rather cautiously imposed some additional tests by statute, and the House of Representatives or the Senate has probably added a very few more qualifications by established usage (a sort of legislative common law) to cover certain obvious cases of unfitness." CHAFEE, *FREE SPEECH IN THE UNITED STATES* 257 (1941)

Under the historical precedents of England, the Colonies, the House, and the Senate, we submit that the House had power to deal as it did with misconduct in office of the sort evidenced by Mr. Powell. See generally Op. 49-53 (Burger, J.), 54-56 (McGowan, J.), 60, 64 (Leventhal, J.). Indeed, the Brief of the Special Committee of the Association of the Bar of the City of New York in connection with the expulsion of five members of the Socialist Party from the New York State Assembly on which petitioners rely heavily (Pet. 27-29),

II. There Is No Practical Occasion or Reason for Review of this Case by this Court.

The resolution challenged in this case, House Resolution 278, excludes Mr. Powell from the 90th Congress. That Congress is expected to adjourn some time this summer, perhaps before the National Conventions in August, and in any event well before the November elections. Its term and that of all Members of the House will end at noon on January 3, 1969, pursuant to the Twentieth Amendment. Yet, despite this timetable, petitioners took their full 90 days to file the petition, waiting until almost the last moment on May 28, 1968. Nor did they seek expedited consideration, by a more timely filing or otherwise, although the adjournment of this Court's term was imminent and subsequently occurred on June 17, 1968. As a result, the petition will not be acted upon until next October at the earliest.

Even if certiorari should be granted then, there would be almost no time left for briefing, argument and decision before the issue of Mr. Powell's exclusion will be completely mooted by the official end of the 90th Congress on Janu-

was careful to point out that no charges had been made "of any misconduct in office or of any violation of law on their part. . . ." Quoted in *CHAFEE, supra*, at 275.

(2) Petitioners' due process claims lack substance. Mr. Powell was informed of the charges against him (Op. 5), and the procedural rights accorded him were ample. See, e.g., *Cafeteria Workers, Local 473 v. McElroy*, 367 U. S. 886; *Hannah v. Larche*, 363 U. S. 420. In any event, he did not avail himself of those rights because of his insistence that the Select Committee was limited to considering his age, citizenship, and inhabitancy. As Judges McGowan and Leventhal observed (Op. 55, 62-63) any questions of procedure could have been resolved if Mr. Powell had not insisted, erroneously in their view and ours, that the question of his misconduct was irrelevant to the Committee's inquiry.

ary 3, 1969. Since the exclusion issue will become practically moot when the 90th Congress adjourns and irrevocably so when it ends on January 3, 1969, we submit that there is no practical reason or warrant for this Court to consider the matter. See *Aleandrino v. Quezon*, 271 U. S. 528, where this Court refused to review a resolution suspending a member of the Philippine Senate because the period of suspension had expired and it was "therefore in this Court a moot question whether lawfully he could be suspended in the way in which he was"; held equally moot was "the still more important question" whether the courts had any jurisdiction to compel the Senate to rescind its resolution and readmit Aleandrino. *Id.* at 532-33.*

The leisurely pace followed by petitioners and Mr. Powell's failure to seek his seat since his reelection on April 11, 1967, contrast with the strident but increasingly stale pleas of urgent importance and need for speedy

* The Court reached this conclusion notwithstanding that Aleandrino might have some incidental claim to salary and other emolument if illegally withheld during the period of suspension. Since "the main question as to the validity of the suspension has become moot," the Court concluded that the incidental feature of Aleandrino's claimed salary was "not in itself a proper subject for determination as now presented. . . ." 271 U.S. at 535. The reasons assigned for that conclusion apply equally here. The thrust of this action is to compel the House to seat Mr. Powell. His asserted claim to salary is only incidental, is not properly a matter for determination in the context of this case (that suit belonging, if anywhere, in the Court of Claims, 28 U.S.C. § 1491 (1964)), and will not prevent this case from becoming moot when the 90th Congress ends.

Bond v. Floyd, 385 U.S. 116, is not to the contrary. In answer to the question raised in oral argument as to whether that case was moot since the session of the Georgia House which excluded Bond was no longer in existence, this Court said: "The State has not pressed this argument, and it could not do so, because the State has stipulated that if Bond succeeds on this appeal he will receive back salary for the term from which he was excluded." *Id.* at 128 n.4. There is no such stipulation here. Also, the term from which Bond was excluded did not end until December 31, 1966, and accordingly had not expired when this Court decided the case on December 5, 1966.

resolution which are sounded in the petition. Whether or not the petition is a serious effort to obtain review, this essentially political matter should appropriately be left for resolution by the political process. The shortness of time remaining for the 90th Congress, and the thorough consideration the court below gave to the reasons and precedents militating against judicial consideration, leave this case devoid of the stuff of practical importance which warrants the attention of this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

June 27, 1968

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, Jr., et al., *Petitioners,*
against

JOHN W. McCORMACK, et al., *Respondents.*

BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argument

Point One

The action of the majority of the House of Representatives in refusing to allow a duly elected Representative of the people who meets all the constitutional qualifications for membership in the House to take his seat and further barring him from membership in the House for the entire 90th Congress violated the Constitution of the United States

27

Preliminary Statement

27

A. The House of Representatives is required under the Constitution to seat a duly elected Congressman who meets all the qualifications for membership in the House set forth in the Constitution

29

(i) It was the firm intention of the Framers that the legislature was to have no power to alter, add to, vary or ignore constitutional qualifications for membership in either House

29

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, Jr., et al., *Petitioners,*
against

JOHN W. McCORMACK, et al., *Respondents.*

**BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Opinions Below

The Court of Appeals for the District of Columbia Circuit, in an opinion by Circuit Judge Berger for the Court affirmed the order of the District Court denying an application for certification of the necessity of a statutory three judge court and dismissing the complaint for want of jurisdiction over the subject matter. Circuit Judges McGowen and Leventhal concurred in separate opinions. The opinion of Circuit Judge Berger is reported at 395 F.2d 577 (App. D.C. 1968). The concurring opinion of Circuit Judge McGowen is reported at 395 F.2d 605 and the concurring opinion of Circuit Judge Leventhal is reported at 395 F.2d 607. The opinion of the District Court is reported at 266 F. Supp. 354 (D.C. D.C. 1967).

Jurisdiction

The order and judgment of the District Court was entered on April 7, 1967. The order and judgment of the Court of Appeals was entered on February 28th, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Statute Involved

HOUSE RESOLUTION 278

IN THE HOUSE OF REPRESENTATIVES approved March 1, 1967.

RESOLUTION

WHEREAS,

The Select Committee appointed Pursuant To H. Res. 1 (90th Congress) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct toward the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained in his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964 to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D. C. or the State of New York as required by law.

Fourth, as Chairman of the Committee on Education and

Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member; Now, therefore, be it

Resolved, That said Adam Clayton Powell, Member-Elect from the Eighteenth District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress, and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.

Questions Presented

1. Whether the refusal of the House of Representatives to seat a duly elected Representative of the people, who meets all the constitutional qualifications for membership in the House, and further to bar him from membership for the entire 90th Session violates the Constitution of the United States, and in particular Article One, Clause Two, and Article One, Clause Five, thereof?

2. Whether the refusal of the House of Representatives to seat a duly elected Representative of the people, who meets all the constitutional qualifications for membership in the House violates the fundamental and inalienable rights of the class of Petitioners, citizens of the 18th Congressional District of New York to the free choice of their own representatives to the Legislature essential to a system of representative democracy?

3. Whether the legislative punishment inflicted upon the Petitioner by the enactment of House Resolution 278 violated the Constitutional prohibition against Bills of Attainder?

4. Whether the punishment by exclusion of the Peti-

tioner from membership in the House violated the Due Process guarantee of the Fifth Amendment to the Constitution of the United States?

5. Whether the exclusion of the Petitioner violated his rights and the rights of the class of Petitioners representing the overwhelming Negro majority of the citizens of the 18th Congressional District of New York guaranteed to them by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States?

6. Whether the dismissal of the complaint for "want of jurisdiction over the subject matter" was erroneous and in violation of Article III of the Constitution of the United States?

7. Whether the questions presented in the complaint are justiciable and subject to review by the national courts?

8. Whether the courts have power to grant the relief required to remedy the violations of Petitioners' rights?

9. Whether the District Court erred in refusing to certify the necessity for a three-judge statutory district court and, if so, whether this Court should order the convening of such a court and instruct such court to grant forthwith the relief prayed for herein?

Statement of the Case

The bedrock constitutional questions raised in this appeal arise out of the extraordinary, arbitrary, and unconstitutional action of the majority of the House of Representatives on March 1, 1967, in excluding Adam Clayton Powell, Jr., the duly elected Member-elect from the 18th Congressional District of New York, possessing all requisite constitutional qualifications for membership in that body, and, further permanently barring him from membership in the entire 90th Session of the House. Because many of the relevant facts relating thereto have been of necessity incorporated in the legal arguments hereinafter set forth, Petitioners will here confine themselves to a recital of the basic

uncontested facts leading up to the House's extraordinary unconstitutional action which has resulted in a crisis decisive to the future of representative democracy in this country.

A—Statement of Facts

Petitioner Adam Clayton Powell, Jr., the duly nominated Democratic candidate for the House of Representatives for the 18th Congressional District of New York, received the greatest number of votes cast for that office at the general election of November 8, 1966. The official tabulation of said votes, as certified by the Secretary of State of the State of New York, was as follows:

Lassen L. Walsh (Rep) 10,711
 Adam C. Powell (Dem) 45,308
 Richard Prideaux (Lib) 3,954
 Rylan E. D. Chase (Con) 1,214

Based upon said tabulation a certificate of election was issued by the Secretary of State on December 15, 1966, and duly forwarded to and received by the Clerk of the House of Representatives.

The 90th Congress opened on January 10, 1967, after respondent McCormack had been elected as the Speaker of the House of Representatives and duly sworn pursuant to the provisions of Title 2, U.S. Code, Section 25. He informed the House that he would, pursuant to said Section 25, administer the oath to the Members-elect thereof. Prior to said administration, however, Representative Van Deerlin, of California, asked that Congressman Powell stand aside during the administration of said oath, which request, because of its status as a point of the highest personal privilege, was granted by the Speaker. After the other Members-elect has been sworn, a resolution, herein-after referred to as House Resolution 1, was introduced and passed. House Resolution 1 reads as follows:

Resolved, That the question of the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House to be appointed by the Speaker, four of whom shall be Members of the minority party appointed after consultation with the minority leader. Until such committee shall report upon and the House shall decide such question and right, the said Adam Clayton Powell shall not be sworn in or permitted to occupy a seat in this House.

For the purpose of carrying out this resolution the committee, or any subcommittee thereof authorized by the committee to hold hearings, is authorized to sit and act during the present Congress at such times and places within the United States, including any Commonwealth or possession thereof, or elsewhere, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee or any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

Until such question and right have been decided, the said Adam Clayton Powell shall be entitled to all the pay, allowances, and emoluments authorized for Members of the House.

The committee shall report to the House within five weeks after the members of the committee are appointed the results of its investigations and study, together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

Subsequently, and on January 19, 1967, the Speaker, pursuant to the provisions of the aforesaid resolution, appointed five Democrats and four Republicans, all lawyers, to serve as members of said select committee under the chairmanship of the Honorable Emanuel Celler, the Chairman of the House Judiciary Committee. On February 1, 1967, Mr. Celler, at the direction of the Select Committee, invited Member-elect Powell to appear before it "to give testimony and to respond to interrogation" concerning his age, citizenship and inhabitancy and certain other matters.*

* The chairman's letter was as follows:

HON. ADAM CLAYTON POWELL
U. S. House of Representatives,
Washington, D. C.

Dear Mr. Powell: I enclose a copy of House Resolution 1, 90th Congress, pursuant to which the Speaker on January 19, 1967, after consultation with the Minority Leader, appointed the following Members to carry on the inquiry contemplated therein:

Honorable Emanuel Celler, Chairman; Honorable James C. Corman; Honorable Claude Pepper; Honorable John Conyers, Jr.; Honorable Andrew Jacobs, Jr.; Honorable Arch A. Moore, Jr.; Honorable Charles M. Teague; Honorable Clark MacGregor; Honorable Vernon W. Thompson.

The Committee has directed me to invite you to appear before it on Wednesday, February 8, 1967, at 10:30 A.M., in Room 2141, Rayburn House Office Building, Washington, D. C., to give testimony and to respond to interrogation concerning your qualifications of age, citizenship and inhabitancy, and the following other matters:

(1) The status of legal proceedings to which you are a party, in the State of New York and in the Commonwealth of Puerto Rico, with particu-

The attorneys for Petitioner Powell filed several motions and supporting memoranda before, during, and after hearings held by the Select Committee on February 8, 14 and 16, 1967, all raising the issue of the denial to him of both substantive and procedural due process by the Committee's proceeding to consider the matter of seating or expelling him without the minimum due process requirements of an adversary hearing.*

These motions and memoranda objected to: 1) the absence of any guides or standard by which alleged misconduct would be measured; 2) the absence of any charges and specification of violation of ascertainable proscribed conduct; 3) the absence of any of the procedural safeguards of an adversary hearing—such as a statement of charges, the right of confrontation, the right of cross-examination and the right of counsel in an adversary proceeding.

The total effect of these deprivations of due process was to deny to the individual and class petitioners fundamentally protected constitutional rights without any of the traditional safeguards of an adversary proceeding, although the resulting recommendations included, for example, one that "Adam Clayton Powell, *as punishment*, pay the Clerk of the House to be disposed of by him according to law, \$40,000 (emphasis added.)†

lar reference to the instances in which you have been held in contempt of court;

(2) Matters of your alleged official misconduct since January 3, 1961. You are advised that you may be accompanied by counsel and that the hearings will be conducted in accordance with paragraph 26, rule XI of the Rules of the House of Representatives.

Sincerely yours,

EMANUEL CELLER,
Chairman.

(Exhibit 1B to Petitioners' Motion for Summary Reversal below)

* (See Exhibit 1B, to Petitioners' Motion for Summary Reversal below, pp. 6-14, 31-49, 53-54, 111-113, 255-266.)

† (Exhibit 1C to Petitioners' Motion for Summary Reversal below, p. 34.)

Petitioner Powell accompanied by counsel appeared before the Select Committee on February 8, 1967, and, after certain preliminaries† which were made part of the record,** the Committee received a brief and heard argument by counsel for him on the principal substantive motion submitted; received, but refused to entertain argument on his procedural motions, and took all of the motions—which the Chairman initially characterized as “dilatory”†—under advisement. The Chairman, over the protest of Petitioner Powell’s counsel as well as one member of the Committee, then insisted that he, Powell, take the oath and be interrogated by counsel for the Committee. The interrogation began and was interrupted shortly thereafter by the objection of Petitioner Powell’s attorneys and their insistence that he would not proceed further without a ruling upon his pending motions. Thereupon, the Committee recessed and, upon reconvening, the Chairman denied all of the motions.†

† These included “official notice of the published hearings and reports of the Special Subcommittee on Contracts of the Committee on House Administration of the U. S. House of Representatives, 89th Congress, Second Session, relating to expenditures during the 89th Congress by the House Committee on Education and Labor and the clerk-hire status of Y. Marjorie Flores (Mrs. Adam Clayton Powell).”

** (Exhibit 10 to Petitioners’ Motion for Summary Reversal below, p. 2.)

† He later withdrew this categorization.

† With specific reference to Motion No. 5, which read as follows: Member-Elect Adam Clayton Powell, Jr., moves that he be afforded all the rights and protections guaranteed by the United States Constitution and the rules and precedents to a Member-Elect whose right to a seat in the House of Representatives is contested, including, but not limited to the following:

- (1) Fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser;
- (2) the right to confront his accusers and in particular to attend in person and by counsel, all sessions of this Committee at which testimony or evidence is taken and to participate therein with full rights of cross-examination;
- (3) the right to an open and public hearing;
- (4) the right to have this Committee issue its process to summon witnesses whom he may use in his defense;
- (5) the right to transcript of every hearing.

Petitioner Powell, under protest thereupon proceeded to be interrogated by counsel for the Committee but limited his testimony, upon the advice of counsel, to the constitutionally prescribed qualifications of age, citizenship and inhabitancy. Counsel for Petitioner Powell then submitted and the Committee received documentary evidence as to those issues. The Chairman thereupon refused to permit Mr. Powell, as previously promised to make a statement at that time.

Petitioner Powell, under the circumstances, did not again appear personally before the Committee. However, the Committee, under date of February 10, 1967, informed him that it would appreciate receiving certain information from him or his counsel.*

The Chairman, after denying same, stated:

"This is not an adversary proceeding. The committee is going to make every effort that a fair hearing will be afforded, and prior to this date has decided to give the Member-Elect rights beyond those afforded an ordinary witness under the House rules.

The committee has put the Member-Elect on notice of the matters into which it will inquire by its notice of the scope of inquiry and its invitation to appear, as well as by conferences with, and a letter from its chief counsel to the counsel for the Member-Elect. Prior to this hearing the committee decided that it would allow the Member-Elect the right to an open and public hearing, and the right to a transcript of every hearing at which testimony is adduced. The committee has decided to summon any witnesses having substantial relevant testimony to the inquiry upon the written request of the member-Elect or his counsel. The Member-Elect certainly has the right to attend all hearings at which testimony is adduced and to have counsel present at those hearings. In all other respects, the motion is denied. Again the committee states that this is an inquiry and not an adversary proceeding."

* The Committee's letter to Petitioner Powell read as follows:

"Dear Mr. Powell: We wish to advise you that Select Committee, pursuant to House Resolution 1, 90th Congress, will hold a public hearing on Tuesday, February 14, 1967, at 10:00 o'clock a.m. in Room 2141, Rayburn House Office Building, Washington, D.C.

You and your counsel of record are invited to be present at the hearing. During the hearing on February 8, 1967, you are advised that upon the written request of you or your counsel, Select Committee will summon any witnesses having substantial relevant testimony to the inquiry being

(Footnote continued on next page)

(Footnote continued from preceding page)

conducted by the Committee. I remind you of this and suggest that if you or your counsel desire to take advantage of the privilege afforded, please contact Mr. William A. Geoghegan, chief counsel of the Committee, and inform him of the names of the persons you would like summoned as witnesses and the nature of the testimony to be offered.

First and second motions made during the hearing on February 8 by your counsel Arthur Kinoy, Esquire, indicated you took the position Select Committee lacks authority to inquire into matters other than whether you have a right to take the oath and be seated as a member of the 90th Congress. And that, in making such determination, Select Committee is limited to inquiry to whether you met the qualifications for membership in the House, specifically, enumerated in Article I, Section 2, of the Constitution. These motions were denied.

The Select Committee has deferred decision on the question raised by the original motion of your counsel as to whether the qualifications for membership in the House, specifically enumerated in Article I, Section 2, of the Constitution, age, citizenship, and inhabitancy, should be deemed exclusive. Further, we are of the opinion that the Select Committee is required by House Resolution 1, 90th Congress, to inquire not only into the question of your right to take the oath and be seated as a member of the 90th Congress, but additionally and simultaneously to inquire into the question of whether you should be punished or expelled pursuant to the powers granted by the House under Article I, Section 5, Clause 2 of the Constitution. In other words, the Select Committee is of the opinion that at the conclusion of the present inquiry, it has authority to report back to the House recommendations with respect to your seating, expulsion or other punishment.

The public hearing scheduled for next Tuesday, February 14, 1967, the Select Committee would appreciate receiving from you or your counsel answer to the following questions:

One: With reference to the seating phase of our inquiry, do you refuse to give any testimony concerning (a) status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico with particular reference to the instances in which you have been held in contempt of court, and (b) alleged official misconduct on your part occurring at any time since January 3, 1961?

Two: With reference to the second phase of our inquiry, relating to the power of the House to punish or expel pursuant to Article I, Section 5, Clause 2 of the Constitution, do you refuse to give any testimony concerning (a) status of legal proceedings in which you are a party of the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court, and (b) alleged official misconduct on your part occurring at any time since January 3, 1961?

At the public hearing scheduled for next Tuesday, February 14, 1967, you are again invited to give testimony and response to interrogation concerning the matters referred to in a letter dated February 6, 1967,

(Footnote continued on next page)

On February 14, 1967, counsel for Mr. Powell appeared before the Committee and responded fully to its request for information.*

from Mr. William A. Davis, chief counsel of the Select Committee, to your counsel, Mrs. Jean Camper Cahn, a copy of which is enclosed.

At the conclusion of your testimony next Tuesday, or, if you decline to testify, at the conclusion of the hearing, you will be given the opportunity to make a statement relevant to the subject matter of the Select Committee's inquiry. Unless additional matters come to our attention in the interim, the Select Committee has decided to conclude hearings on Tuesday, February 14, 1967.

EMANUEL CELLER, Chairman.

* The response of petitioner's counsel was as follows:

"The Member-Elect has received a letter dated February 10, 1967, from the Chairman of this Committee. That letter advises that this Committee had deferred decision on the question raised by Congressman Powell and his counsel "as to whether the qualifications for membership in the House specifically enumerated in Article I, Section 2 of the Constitution) age, citizenship, and inhabitancy) should be deemed exclusive." We appreciate clarification of the Committee's action on this question.

The Committee further advises that it regards its mandate not only to inquire into Congressman Powell's qualifications for membership in the House of Representatives, "but additionally and simultaneously to inquire into whether" punishment or expulsion should be recommended to the House pursuant to powers granted under Article I, Section 5, Clause 2 of the Constitution. The provision reads:

"Each House may determine the rules of its proceedings, punish its members for disorderly behavior and with the concurrence of two-thirds expel a member."

In short, this Committee conceives its function and scope as broad enough for it to determine Congressman Powell's right to take the oath as a member of the 90th Congress, and to determine simultaneously whether he has engaged in conduct warranting punishment by the House or expulsion therefrom, all in the same proceeding.

In connection with what this Committee conceives to be the proper scope of its inquiry the Committee invited Congressman Powell or his counsel to answer at this hearing the following questions:

1. As to what is described as the "seating phase" of the Committee's inquiry whether Congressman Powell refuses to give any testimony concerning:

(a) the status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court; and

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(b) alleged official misconduct on your part occurring at any time since January 3, 1961.

2. As to what is described as "the second phase" of the Committee's inquiry "relating to the power of the House to punish or expel pursuant to Article I, Section 5, Clause 2, of the Constitution," whether Congressman Powell refuses to give any testimony as to matters set out in (a) and (b) above.

It is our position and contention that this Committee in seeking to resolve the legal and constitutional questions raised as to the appropriate scope of its inquiry has compounded the legal and constitutional defects initially asserted in this inquiry.

The short of our position is that H.R. No. 1 authorizes inquiry solely and exclusively into Congressman Powell's qualifications for membership in the House. If we are in error in that regard, then we take the flat position that the House could not, pursuant to H.R. No. 1, or indeed pursuant to any resolution, authorize any Committee to make the kind of simultaneous inquiry which this Committee proposes to undertake. Before the power to punish a 'member', pursuant to Article I, Section 5, Clause 2 of the Constitution can be invoked, the determination of membership must have been concluded on the basis of qualifications for membership as set forth in Article I, Section 2, Clause 2 of the Constitution.

In summary, the reasons for our position are as follows:

1. Article I, Section 2, Clause 2 of the Constitution set forth the sole and exclusive qualification for membership in the House of Representatives.

2. Article I, Section 5, Clause 2 of the Constitution deals expressly and exclusively with the power of the House to discipline its members—those persons who have been sworn and seated as members and for appropriate reasons are subject to punishment or expulsion. The meaning of the words is plain and unambiguous and the precedents and practice of the House compel the stated conclusion.

3. We concede, as we must, that the House has the power to proceed under each of these provisions. We reject, however, the Committee's assertion that the House, or any of its committees, can merge in one proceeding the power authorized by the two constitutional provisions. The precedent of the House supports this view. One of the basic reasons for the House's having consistently taken this position is because the merger of the two functions has been recognized as a method to expand unlawfully and dangerously the qualifications for membership in the House beyond the three stated in the Constitution.

4. Proceedings under Article I, Section 2, Clause 2, and proceedings under Article I, Section 5, Clause 2 involve two disparate functions which cannot be accomplished simultaneously. When the House proceeds under Article I, Section 2, Clause 2 to determine whether a member-elect possesses the requisite constitutional qualifications of age, citizenship, and

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Thereafter, the Committee held hearings and received evidence, culminating in its Report.

The following Findings, Conclusions and Recommendations appeared in the Committee's Report:*

inhabitaney, it is exercising an investigatory function. It is merely determining what the facts are in this regard. When the House proceeds under Article I, Section 5, Clause 2, however, its action is in the nature of a judicial function. It is making a judicial determination as the trier of the facts as to whether a member charged with some form of misbehavior is guilty and should be punished even to the extent of expulsion. The Constitution itself requires that such process must take place within the framework of the minimal protections of the due process of law, including the specification of charges, right of confrontation, right to counsel, and the right to be heard. While we believe and have asserted that some of the basic requirements of due process must be adhered to in respect to proceedings under Article I, Section 2, Clause 2, since no punishment is involved, the standards are clearly not as strict as they must be in respect to Article I, Section 5, Clause 2.

5. Article I, Section 5 does not accord to the House a general judicial function. The function it has as a judicial body is limited solely and exclusively for the purpose of preventing obstructions to the House in the exercise of its legislative powers. Accordingly, the precedents uniformly hold that the "disorderly behavior" referred to in Article I, Section 5, Clause 2 relates solely to misconduct committed against the current House.

Accordingly, as to the "seating phase" of the Committee's inquiry, it is our position, as indicated by our motions, brief and oral argument heretofore that the scope and extent of the Committee's inquiry is limited to the three qualifications set out in Article I, Section 2. Therefore, we submit that the only and exclusive issues pertinent to Congressman Powell's right to a seat in the 90th Congress are whether he is 25 years of age, a United States citizen for seven years, and an inhabitant of New York. As to any issues beyond that, we are of the opinion that these are outside the jurisdiction of this Committee, and we have so advised the Member-Elect.

As to the "second phase" of the Committee's inquiry as delineated in the letter of February 10, it is our contention that neither the Committee nor the Congress can pursue an inquiry into its power to punish or expel a member without having first settled the threshold question of the Congressman's right to a seat.

Accordingly, we are of the opinion that any question except those relevant to the constitutional qualifications of Member-Elect Powell are outside the jurisdiction of the Committee, and we have so advised the Member-Elect.

Moreover, it is our considered opinion that this Select Committee cannot legally and constitutionally pursue these two objectives simultaneously.

We request the opportunity to submit a brief developing these responses prior to the close of these hearings.

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FINDINGS

* 1. Mr. Powell is over 25 years of age, has been a citizen of the United States of America for over 7 years, and on November 8, 1966, was an inhabitant of New York State.

2. Mr. Powell has repeatedly asserted a privilege and immunity from the processes of the courts of the State of New York not authorized by the Constitution. Mr. Powell has been held in criminal contempt by an order of the New York State Supreme Court, a court of original jurisdiction, entered on November 17, 1966. This order is now on appeal to the Appellate Division, first department, an intermediate appellate court in the State of New York, and is not a final order. At the time of the Committee's hearings, there were also outstanding three court orders holding Mr. Powell in civil contempt which were issued May 8, 1964, October 14, 1966, and December 14, 1966. The order of May 8, 1964, was vacated when the final judgment against Mr. Powell was satisfied on February 17, 1967.

3. As a Member of Congress, Mr. Powell wrongfully and willfully appropriated \$28,505.34 of public funds for his own use from July 31, 1966, to January 1, 1967, by allowing salary to be drawn on behalf of Y. Marjorie Flores as a clerk-hire employee when, in fact, she was his wife and not an employee in that she performed no official duties and further was not present in the State of New York or in Mr. Powell's Washington office, as required by Public Law 89-90, 89th Congress.

4. As a Member of Congress, Mr. Powell wrongfully and willfully appropriated \$15,683.27 of public funds to his own use from August 31, 1964, to July 31, 1965, by allowing salary to be drawn on behalf of said Y. Marjorie Flores as a clerk-hire employee when any official duties performed by her were not performed in the State of New York or Washington, D.C., in violation of House Resolution 294 of the 88th Congress and House Resolution 7 of the 89th Congress.

5. As chairman of the Committee on Education and Labor, Mr. Powell wrongfully and willfully appropriated \$214.79 of public funds to his own use by allowing Sylvia Givens to be placed on the staff of the House Education and Labor Committee in order that she do domestic work in Bimini, the Bahama Islands, from August 7 to August 20, 1966; and in that he failed to repay travel charged to the committee for Miss Givens from Miami to Washington, D. C.

6. As chairman of the Committee on Education and Labor, Mr. Powell on March 28, 1965, wrongfully and willfully appropriated \$72 of public funds by ordering that a House Education and Labor Committee air travel card be used to purchase air transportation for his own son (Adam Clayton Powell III), for a member of his congressional office clerk-hire staff (Lillian Upshur), and for personal friends (Pearl Swangin and Jack Duncan), none of whom had any connection with official committee business.

7. As chairman of the Committee on Education and Labor, Mr. Powell willfully misappropriated \$461.16 of public funds by giving to Emma T. Swann, a staff receptionist, airline tickets purchased with a committee

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credit card for three vacation trips to Miami, Fla., and return to Washington, D. C.

8. During his chairmanship of the Committee on Education and Labor, in the 89th Congress, Mr. Powell falsely certified for payment from public funds, vouchers totaling \$1,291.92 covering transportation for other members of the committee staff between Washington, D. C., or New York City and Miami, Fla., when, in fact, the chairman (Mr. Powell) and a female member of the staff had incurred such travel expenses as a part of their private travel to Bimini, the Bahamas.

9. As chairman of the Committee on Education and Labor, Mr. Powell made false reports on expenditures of foreign exchange currency to the Committee on House Administration.

CONCLUSIONS AND RECOMMENDATIONS

On the basis of the factual record before it, this Select Committee concludes that Member-Elect Adam Clayton Powell meets the qualifications of age, citizenship, and inhabitancy and holds a certificate of election from the State of New York. This Committee concludes, however, that the following conduct and behavior of Adam Clayton Powell has reflected adversely on the integrity and reputation of the House and its Members:

First, Adam Clayton Powell has repeatedly ignored processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the New York courts has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Second, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964, to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C., or New York, as required by law.

Third, as chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of House funds for private purposes.

Fourth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member.

Simultaneously with the filing of this report and the hearings in connection therewith, the Select Committee is forwarding copies of its hearings, records, and report to the Department of Justice for prompt and appropriate action, with the request that the House be kept advised in the matter.

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This Committee recommends that—

1. Adam Clayton Powell be permitted to take the oath and be seated as a Member of the House of Representatives.
2. Adam Clayton Powell by reason of his gross misconduct be censured and condemned by the House of Representatives.
3. Adam Clayton Powell, as punishment, pay the Clerk of the House, to be disposed of by him according to law, \$40,000; that the Sergeant-at-Arms of the House be directed to deduct \$1,000 per month from the salary otherwise due Mr. Powell and pay the same to the Clerk, said deductions to continue until said sum of \$40,000 is fully paid; and that same sums received by the Clerk shall offset any civil liability of Mr. Powell to the United States of America with respect to the matters referred to in paragraphs Second and Third above.
4. The seniority of Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.
5. The House direct the Clerk of the House of Representatives to forthwith terminate salary payments to Corrine Huff whose name appears on the clerk-hire payroll of Representative Adam Clayton Powell.
6. The House make a study in depth to determine whether or not existing procedural and substantive rules are adequate in cases involving charges of breach of public trust which have been lodged against any Member.
7. The Committee on House Administration, which currently is undertaking a revision of its auditing procedures, be directed by the House to file annually a report of audit of expenditures by each committee of the House and the clerk-hire payroll of each Member.

... We recommend the adoption of the following resolution:

Whereas the Select Committee appointed pursuant to House Resolution 1 (90th Cong.) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship, and inhabitancy for membership, in the House of Representatives and holds a certificate of election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct toward the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964, to December 31, 1966, during which period either she performed no official duties whatever or such duties were not

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On March 1, 1967, the House of Representatives, upon presentation to it of the said Committee Report, including the recommended resolution, rejected the resolution as proposed by the Committee and instead adopted House Resolution 278.*

performed in Washington, D.C., or the State of New York as required by law.

Fourth, as chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of Government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member:

Now, therefore be it resolved,

1. That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-Elect from the 18th District of the State of New York.

2. That upon taking the oath as a Member of the 90th Congress the said Adam Clayton Powell be brought to the bar of the House in the custody of the Sergeant-at-Arms of the House and be there publicly censured by the Speaker in the name of the House.

3. That Adam Clayton Powell, as punishment, pay to the Clerk of the House to be disposed of by him according to law, \$40,000. The Sergeant-at-Arms of the House is directed to deduct \$1,000 per month from the salary otherwise due to said Adam Clayton Powell and pay the same to said Clerk, said deductions to continue while any salary is due the said Adam Clayton Powell as a Member of the House of Representatives until said \$40,000 is fully paid. Said sums received by the Clerk shall offset to the extent thereof any liability of the said Adam Clayton Powell to the United States of America with respect to the matters referred to in the above paragraphs 3 and 4 of the preamble to this resolution.

4. That the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. That if the said Adam Clayton Powell does not present himself to take the oath of office on or before March 13, 1967, the seat of the 18th District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.

(Exhibit 1C to Petitioners' Motion for Summary Reversal below)

* "RESOLVED, That said Adam Clayton Powell, Member-elect from the 18th District of the State of New York be, and the same hereby is excluded from membership in the 90th Congress and that the Speaker shall notify the Governor of the State of New York of the existing vacancy."

B—The Proceedings Below

1. The initiation of the complaint

The present action, which was brought by Congressman Powell and thirteen of his constituents, as class representative of the electors of the 18th Congressional District, was instituted by the filing and service of a complaint seeking declaratory and injunctive relief and relief in the nature of mandamus, on March 8, 1967. The defendants named therein are the Speaker of the House of Representatives, five other members thereof, and the Clerk, the Sergeant-at-Arms and the Doorkeepers. The Member-defendants are sued individually and as representative of the class of Members, while the non-Member defendants are sued individually and in their respective capacities as agents or employees of the House of Representatives.

The complaint alleged that House Resolution 278 violated Article I, Section 2, Clause 2 of the Constitution of the United States in that it prescribed qualifications for membership in the House of Representatives other than those established therein. The complaint further alleged that the enactment of House Resolution 278, as to all non-white electors of the 18th Congressional District of New York, violated the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States. The complaint further alleged that as to the female electors of the 18th Congressional District of New York, the enactment of House Resolution 278 violated the Nineteenth Amendment to the Constitution of the United States.

The complaint further alleged that insofar as Member-Elect Powell is concerned, House Resolution 278 constitutes a bill of attainder and an *ex post facto* law, in violation of Article I, Section 9 of the Constitution and inflicts cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution of the United States. Finally, the

complaint further alleged that the hearings before the select committee, as well as House Resolution 278 and the debate thereon, denied Congressman Powell his fundamental rights of due process of law, in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

2. Proceedings in the District Court

After the filing and service of the complaint upon respondents, an application for the certification of the necessity of convening a three-judge court pursuant to 28 U.S.C. 2282 and 2284, and a motion for a preliminary injunction came on before the United States District Court for the District of Columbia on April 4, 1967. In addition to opposing Petitioners' application for the certification of the necessity of convening a three-judge court and their motion for interim injunctive relief, respondents moved to dismiss the action for lack of jurisdiction generally on the grounds that:

- (a) the District Court did not have jurisdiction over the subject matter of the action;
- (b) the District Court did not have jurisdiction over the persons of the respondents; and
- (c) the complaint failed to state a cause of action upon which relief could be granted.

On April 7, 1967, the District Court issued an order (i) denying the application for the certification of the necessity of three-judge court; (ii) dismissed the complaint for want of jurisdiction over the subject matter, and (iii) denying the motion for a preliminary injunction. In so doing the Court bottomed its decision on what it considered the doctrine of separation of powers. As is stated:

"It is the conclusion of this Court that for the Court to decide this case on the merits and to grant

any of the relief prayed for in the complaint would constitute a clear violation of the doctrine of separation of powers. For this Court to order any Member of the House of Representatives of the United States, any officer of the House, or any employee of the House to do or not to do an act related to the organization or membership of that House, would be for the Court to crash through a political thicket into political quicksand.

"This Court holds, therefore, that by reason of the doctrine of separation of powers, this Court has no jurisdiction in this matter."

At the same time the District Court entered its order denying the application for a statutory three-judge court and for preliminary injunction and granting the motion to dismiss the complaint for want of jurisdiction of the subject matter. A notice of appeal from the aforesaid order was duly and immediately filed, on April 7, 1967.

3. Proceedings in the United States Court of Appeals for the District of Columbia Circuit

On April 9, 1967, Petitioners moved in the Court of Appeals for a summary reversal of the order and judgment of the District Court, a dispensation of the requirement for the filing of briefs and an immediate hearing thereon. On April 19, 1967, the Court of Appeals denied that portion of the motion seeking an immediate hearing thereon.

Subsequently, and on April 27, 1967, Petitioners' motion for summary reversal of the order and judgment of the District Court came before the Court of Appeals, Bazelon, Chief Judge, and Burger and Leventhal, Circuit Judges. Later that day, the Court of Appeals entered an order denying Petitioners' motions for summary reversal and to

dispense with the filing of briefs, ordered that the appeal be heard on the original record on appeal in lieu of the filing of a printed joint appendix, directed counsel to establish a mutually agreeable briefing schedule by conferring with the Clerk of the Court, and directed the Clerk "to schedule this case for argument on a day as soon after the briefs are filed as the business of the Court will permit."

On May 4, 1967, Petitioners, cognizant that they could not obtain review in this Court before well into the October, 1967 Term by any other procedure than that established by Rule 20 of the Revised Rules of this Court, informed the Court of Appeals that they intended to file an application for a writ of certiorari pursuant thereto. At the same time, Petitioners moved the Court of Appeals to defer any further consideration of their appeal pending the decision of this Court on their application for a writ of certiorari pending judgment below. Thereafter, and on May 5, 1967, Petitioners filed and served a designation of the entire record in the Court of Appeals. On May 10, 1967, the Court of Appeals recognizing "that novel issues of substantial public importance were tendered which . . . should be resolved at an early date" entered an order providing that the time for filing of briefs in that court be extended pending disposition of this Petition by this Court, that the order of the Court of Appeals would be stayed if this Petition is granted, that except as stated in the order, the appellants' motion to stay proceedings was denied without prejudice to the filing of any motion to advance argument if the briefs are filed in the Court of Appeals, and that either party may seek further relief by appropriate motion for good and sufficient cause shown.

Following the denial by this Court of Petitioners' application for a writ of certiorari pursuant to Rule 20,* argument was had in the Court of Appeals. On February

* 387 U.S. 933.

28, 1968, the Court of Appeals affirmed the dismissal of the complaint.

A Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia was granted by this Court on November 18, 1968.

Upon the convening of the 91st Congress on Friday, January 3, 1969, Member-elect Adam Clayton Powell was administered the oath of office and seated pursuant to the following resolution:

H. RES. 2

Resolved—

(1) That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-elect from the Eighteenth District of the State of New York.

(2) That as punishment Adam Clayton Powell be and he hereby is fined the sum of \$25,000, said sum to be paid to the Clerk to be disposed of by him according to law. The Sergeant at Arms of the House is directed to deduct \$1,150 per month from the salary otherwise due the said Adam Clayton Powell, and pay the same to said Clerk until said \$25,000 fine is fully paid.

(3) That as further punishment the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 91st Congress.

(4) That if the said Adam Clayton Powell does not present himself to take the oath of office on or before January 15, 1969, the seat of the Eighteenth District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.

* Cong. Rec., January 3, 1969, p. H19.

This recent action of the House continues the unconstitutional conduct of the respondent, which is developed in this appeal.*

* Congressman Celler, Chairman of the House Judiciary Committee, on January 3, 1969, during the debate on the seating of Mr. Powell, observed:

Mr. CELLER. Mr. Speaker, I yield the balance of the time to myself.

Mr. Speaker, there is a great constitutional question involved here, and that must be made as crystal clear as possible, and that is that the only issue at this point is in determining whether or not ADAM CLAYTON POWELL fits the qualifications laid down in article I, section 5 of the Constitution; namely, inhabitancy, age, and citizenship.

He satisfies those three conditions. He therefore should be admitted to membership in the House of Representatives. Any other qualifications are illegal as far as this House is concerned at this time.

It is true that article I, section 5, of the Constitution provides that the House shall be the judge of the qualifications of its Members.

But we have no right at this juncture to add to the qualifications of article I, section 5 of the Constitution. Make him a Member and then offer a resolution to make inquiry as to his conduct and as to his fitness. That resolution will be referred to an appropriate committee by the Speaker, and inquiry can be made. But what does the MacGregor resolution do?

Mr. CAREY. Mr. Speaker, will the gentleman yield?

Mr. CELLER. Mr. Speaker, I refuse to yield at this time.

The MacGregor resolution says that in addition to the three qualifications there shall be another qualification, a judgment shall be entered against ADAM CLAYTON POWELL in the sum of \$30,000. In other words, in addition to the three qualifications, the MacGregor resolution adds sanctions, adds punishment, and adds a judgment. We have no right to do that, and I am certain the Supreme Court when it makes a decision on ADAM CLAYTON POWELL will so decide.

We have no right, none whatsoever, to enlarge the constitutional qualifications at this juncture, at this time.

(Cong. Rec., January 3, 1969, p. H11).

Summary of Argument

The sweeping constitutional issues in this case which touch the "bedrock of our political system", *Reynolds v. Sims*, 377 U.S. 533, the concept of representative democracy, and raise the most fundamental questions concerning the responsibility of the Court as the "ultimate interpreter of the Constitution", *Baker v. Carr*, 369 U.S. 194, arise out of the extraordinary action of the House of Representatives on March 1st, 1967, in excluding Adam Clayton Powell, Jr., the duly elected Member-elect from the 18th Congressional District of New York and permanently barring him from the entire 90th Session of the House, although he had been found by the House itself to possess all the requisite constitutional qualifications for membership in that legislative body.*

I

The action of the House in refusing to allow a duly elected Representative of the people who meets all the constitutional qualifications for membership in the House to take his seat violates the Constitution of the United States.

(a) The House of Representatives is required under the Constitution to seat a duly qualified Congressman who meets all qualifications for membership in the House set forth in the Constitution. It was the firm intention of the Framers that the Legislature was to have no power to alter, add to, vary or ignore the constitutionally prescribed qualifications for membership in either House. The historical

* On January 3, 1969, in admitting Adam Clayton Powell to membership in the House by creating additional qualifications for his admission in erecting certain conditions of punishment, the House continued this unconstitutional course of conduct.

taproots of this decision made at the Philadelphia convention are to be found in the contemporaneous struggles for the rights of the electorate in the British Parliament and in particular the struggle around the exclusion of John Wilkes from the House of Commons. Moreover, the history of the period of ratification of the Constitution reveals that it would not have been adopted if the ratifying conventions had believed that the Constitution was intended to give to the Legislative branch any power to refuse to seat an elected representative of the people who met the qualifications explicitly set forth in the Constitution itself. Over the years this Court has consistently restated this first precept of representative democracy as expressed by Hamilton at the New York ratifying convention that "the true principle of a Republic is, that the people should choose whom they please to govern them." Elliot's Debates, Book 5, Vol. II, p. 257. From *Newberry v. United States*, 256 U.S. 232 to *Bond v. Floyd*, 385 U.S. 116, this Court has reaffirmed the Philadelphia conclusion that the Legislature may not interfere with the free choice by the people of representatives who meet the constitutional qualifications for membership. The first principles underlying this understanding have been reinforced in many recent decisions of the Court from *Baker v. Carr* to *Williams v. Rhodes* in this Term that the right of the people to choose freely and without restraint their elected representatives is of the essence in a democratic society. Finally, the most important and persuasive precedents of the House and Senate have always acknowledged the constitutional limitations upon their own power to exclude duly elected representatives of the people who meet all the constitutional qualifications for membership in either body.

(b) The punishment of exclusion from membership in the House for the entire 90th Congress inflicted upon Congressman-elect Powell violated Article One, Section 9, Clause 3 of the Constitution prohibiting Bills of Attainder. The

action of the House was in classic terms a "legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri*, 4 Wall 277; *United States v. Brown*, 381 U.S. 437.

(c) The punishment of exclusion from membership in the House violated the Due Process Clause of the Fifth Amendment. It was not an action "based upon reasonable consideration of pertinent matters of fact according to established principles of law." *Newberry v. United States*, 256 U.S. 232. It was "an arbitrary edict of exclusion." *Newberry v. United States*, 256 U.S. at 285. Every elementary right of due process of law was denied to the Congressman-elect on the fundamentally erroneous theory that the proceeding against him was not "adversary" in nature. Hearings of Select Committee, at p. 59.

(d) The exclusion of the Congressman-elect violated his rights and the rights of the overwhelming Negro majority of the citizens of the 18th Congressional District to the equal rights guaranteed to black citizens by the Thirteenth, Fourteenth and Fifteenth Amendments. Even the Chairman of the Select Committee which tried the Congressman-elect has publicly conceded that the punitive action of exclusion of Congressman Powell was at least in part based upon constitutionally impermissible considerations of racism. Such an action tends to perpetuate theories of black inferiority at the heart of the "badges and indicia" of slavery which this nation has pledged itself solemnly to eliminate forever from every aspect of its life.

II

The dismissal of the complaint by the District Court for want of jurisdiction over the subject matter was, as the Court of Appeals acknowledged, wholly erroneous. The complaint presented issues which "arise under" the federal Constitution; it is a "case or controversy" within the meaning of Article III, and the cause is "described in a juris-

dictional statute", namely Title 28 U.S.C. 1331 (a). Cf. *Baker v. Carr, supra*.

Furthermore the subject matter of the suit was justiciable and the refusal of the lower courts to exercise federal jurisdiction dangerously undermines the historic constitutional role of the national courts as the guardians of the civil and political liberties of the people and negates the role of the court as the "ultimate interpreter" of the Constitution. *Baker v. Carr, supra*. The lower courts have failed to undertake the "delicate exercise in constitutional interpretation" which as this Court taught in *Baker* is essential to a determination of "justiciability". This "exercise in constitutional interpretation" would reveal that the issue in this case has *not* been confided by the Constitution to the exclusive control of the Legislature itself and that "the action of that branch exceeds whatever authority has been committed [to it]." *Baker v. Carr* at 311. Under such circumstances a classic case for the exercise of judicial power exists. This Court has taught that the "power of courts to protect the constitutional rights of individuals from legislative destruction [is] a power recognized at least since our decision in *Marbury v. Madison*, 1 Cranch 137 in 1803" *Wesberry v. Sanders*, 376 U.S. 1 (opinion of Mr. Justice Black for the Court). The concept of "separation of powers" requires, rather than prohibits judicial intervention in this case. Any other approach would "subvert the very foundations of all written constitutions" *Marbury v. Madison, supra*, at p. 178.

The suggestion implicit in the lower court opinions that in some manner the case is not justiciable because the Legislative branch might not respect the decisions of this Court as to the meaning of the Constitution, thus impelling a "confrontation" between the branches, is as this Court has taught, an "impermissible suggestion". *MacPherson v. Blacker*, 146 U.S. 1. See *Williams v. Rhodes*, — U.S. —,

(#543-544 October Term, 1968). The underlying precept that this is a "government of laws and not of men", *Marbury v. Madison*, *supra*, at p. 162, requires an acceptance by all branches of government, and indeed by all the people that it is "emphatically the province and duty of the judicial court to say what the law is" *Marbury v. Madison*, *supra*, at p. 175.

The courts cannot decline their constitutional responsibilities out of concern for an "impermissible suggestion" *MacPherson v. Blacker*, *supra*, that the Legislative branch is not equally committed to the first principles of a "government of laws and not men" *Marbury v. Madison*, *supra*, and will question the role of the Judicial branch as "ultimate interpreter of the Constitution". *Baker v. Carr*, *supra*.

ARGUMENT

POINT ONE

The action of the majority of the House of Representatives in refusing to allow a duly elected Representative of the people who meets all the constitutional qualifications for membership in the House to take his seat and further barring him from membership in the House for the entire 90th Congress violated the Constitution of the United States.

Preliminary Statement

There are certain cases in the history of this Court which shape the very fabric of our society, which touch the "bedrock of our political system" *Reynolds v. Sims*, 377 U. S. 533 (1964), and which "strike at the heart of representative government" *Harmon v. Forsennius*, 380 U. S. 528. These are cases which due to their "peculiar delicacy", *Marbury v. Madison*, 1 Cranch 137, invoke that ultimate role of this Court which occasioned only recently words which give strength and security to a free people—

that where "a denial of constitutionally protected rights demands judicial protection, our oath and our office require no less of us" (*Reynolds v. Sims*, *supra*, at p. 565, opinion of the Chief Justice). This appeal once again brings such a case before the Court.

On March 1st 1966 the House of Representatives, by formal vote, concluded that Congressman-Elect Adam Clayton Powell had been duly elected by the constituents of the 18th Congressional District of the State of New York, held a proper Certificate of Election from that State, and "possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives. House Res. 278, March 1st, 1967, Par. One. Nevertheless, in an unprecedented and extraordinary action, the House, overriding the urging of its own Select Committee, the majority and minority leaders of both political parties, and the chairman of its own Judiciary Committee, refused to permit the Speaker to swear in Congressman-Elect Powell as the representatives of the citizens of the district which had overwhelmingly elected him as their representative and ordered that he "be and the same hereby is excluded from membership in the 90th Congress." H. Res. 278¹

This action of the House in refusing to seat the chosen representative of the citizens of the 18th Congressional District although he concededly met all constitutional qualifications for membership in the House and further barring him from representing his constituents for the entire 90th Congress was in open violation of the Constitution of the United States. It disregarded the firm intentions of the framers of the original covenant. It disregarded the clear teachings of this Court from *Newberry v. United States*, 256 U.S. 232 (1920), to *Bond v. Floyd*, 385

¹ See Statute Involved, *supra*, at p. 2.

U.S. 186, in the 1966 Term of Court. It brushed aside reasoned and thoughtful precedents and rulings of its own body. But most serious of all, it challenged the most fundamental precepts of representative democracy upon which this experiment in human government was founded and upon which its ultimate safety depends.

*A. The House of Representatives is required under the Constitution to seat a duly elected Congressman who meets all the qualifications for membership in the House set forth in the Constitution.**

(i) It was the firm intention of the Framers that the legislature was to have no power to alter, add to, vary or ignore the constitutional qualifications for membership in either House.

The history of the proceedings at the Constitutional Convention of 1787 during which the age, citizenship and inhabitancy qualifications for membership in the House were debated and accepted,² and all other qualifications whatsoever were rejected, reveals the unmistakable intention of the Enactors that neither branch of the Legislature was to have any power to alter, add to, vary or ignore the constitutional qualifications. Accordingly the power of each House to be the "judge of the . . . qualifications of its own members",³ was in the intention of the

* Counsel wish to express their appreciation to Harriet Van Tassel, a member of the New York Bar, for her intensive research work on the materials included in this section.

² Article I, § 2, Clause 2 reads:

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected be an inhabitant of the State in which he shall be chosen."

³ Article I, Section 5, reads in pertinent part:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."

Framers, restricted solely to these qualifications set forth in the Constitution itself.

The legislative history of both of these critical clauses during the Philadelphia convention makes this crystal clear. As Professor Charles Warren describes the proceedings in his authoritative study of the Constitutional Convention, *The Making of our Constitution*, (1928) the intention of the Founding Fathers that the Legislature was to have no power to alter, add to or ignore the Constitutional qualifications for membership in either House could not have been clearer.

After agreeing upon the age, citizenship and inhabitancy qualifications, 2 Farrand, *Records of the Federal Convention*, p. 248, et seq., the Convention turned to a proposal of Gouverneur Morris which would "leave the Legislature entirely at large" to set qualifications for membership in each House. 2, Farrand, p. 250.⁴ The effect of this proposal,

⁴ Gouverneur Morris' proposal arose out of a discussion which had great significance to the members of the Convention. After voting upon the age and residence qualifications the Convention was confronted with a proposal that an additional qualification of landed property be affixed to members of the Legislature. On June 26th, George Mason had suggested "the propriety of annexing to the office of Senator a qualification of property" Elliot's Debates, Vol. 5, p. 247. On July 26th, Mason further moved that "the Committee of Detail be instructed to receive a clause requiring certain qualifications of landed property . . . in members of the legislature . . ." Farrand, Vol. 2, p. 121. John Dickinson, of Delaware, strongly opposed such a clause stating that he "doubted the policy of interweaving into a Republican Constitution a veneration for wealth . . ." Farrand, Vol. 2, p. 123. On August 6, the Committee of Detail reported a provision that "The Legislature of the United States shall have authority to establish such uniform qualification of the members of each House, with regard to property, as to the said Legislature shall seem expedient." Farrand, Vol. 2, p. 179. At this point Charles Pinckney moved that the President and Judges also be required to possess "competent property to make them independent." Farrand, Vol. 2, p. 248). Benjamin Franklin strongly opposed this proposal stating that he "expressed his dislike of everything that tended to debase the spirit of the common people." Farrand, Vol. 2, p. 249. Pinckney's motion was "rejected by so general a no that the States were not called". Farrand, Vol. 2, p. 249. At this point Morris moved to give Congress unlimited power to fix qualifications.

Professor Warren points out, "if adopted, would have been to allow Congress to establish any qualifications which it deemed expedient." Warren, at p. 420.

A debate sweeping in its consequences for the establishment of the fundamental principles of representative democracy in this country then developed. Mr. Williamson, of North Carolina, and Mr. Madison, of Virginia, strongly opposed such a proposal. Mr. Williamson argued:

"This could surely never be admitted. Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body." 2 Farrand, *Records of the Federal Convention*, p. 250.

Mr. Madison warned that to permit the Congress to establish such qualifications as it deemed expedient would be "improper and dangerous". Madison's own summary of his position at the Convention is compelling:⁵

"Mr. (Madison) was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the

Farrand, Vol. 2, p. 250. This motion was defeated and following this the Convention rejected the clause as reported by the Committee. Farrand, Vol. 2, p. 251. For a more extensive discussion of the debates and parliamentary moves see Warren, *The Making of the Constitution*, pp. 412 to 426.

⁵ Farrand, Vol. 2, p. 250.

people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of [a weaker] faction."

"Mr. (Madison) observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention.* They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties."

The conclusion which flows from this legislative history is inescapable for as Professor Warren points out:

"The Convention evidently concurred in these views, for it defeated the proposal to give to Congress power to establish qualifications in general by a vote of seven states to four" Warren, p. 421, Farrand, Vol. 2, p. 250

At the same time the Convention also defeated the proposal for a property qualification. Farrand, Vol. 2, p. 250.

* As Professor Warren point out, Madison's reference "was undoubtedly to the famous election case of John Wilkes in England," Warren, *supra*, at p. 420, who had been excluded as a member by the House of Commons on three occasions in 1769. We discuss, *infra*, at pp. 33-45 *et seq.* the extraordinary significance of the Wilkes case in respect to an understanding of the reasons underlying the insistence of the Founders that no power may safely be vested in the legislature to alter in any way the constitutional qualifications for membership in the legislature.

And on this same day, August 10, the Convention, without debate or dissent, agreed to that section of the report which provided that, "Each House shall be the judge of the elections, returns and qualifications of its own members." Farrand, Vol. 2, p. 254

As Professor Warren points out, "the meaning of this provision (which became Article I, § 5 of the Constitution, as finally drafted) is clearly shown" if taken in connection with the legislative actions and debates of August 10th which surrounded its enactment. Warren, *supra*, at p. 420. As Professor Warren summarizes this conclusion:

"Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship and residence.⁷ For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Con-

⁷ Professor Warren further documents his conclusions by noting the interchange between Dickinson, of Delaware, and the Committee of Detail. As Professor Warren comments:

"It is to be noted especially that Dickinson of Delaware, on July 26, expressed his opposition to 'any recital of qualifications in the Constitution' at all on this very ground; for, said he, 'it was impossible to make a complete one and a partial one would by implication tie up the hands of the Legislature from supplying the omission.' The Committee of Detail had differed from Dickinson's view and had made express provision as to qualifications. As to this express provision, Dickinson's argument was undoubtedly applicable that the recital of these qualifications did 'by implication tie up the hands of the Legislature from supplying' any further qualifications." Warren, *supra*, at pp. 421, 422.

gress power to establish qualifications in general, the maximum *expressio unius exclusio alterius* would seem to apply The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications." Warren, *supra*, at p. 421.⁸

- (ii) *The "taproots" of this decision in Philadelphia are to be found in the contemporaneous struggles for the rights of the electorate in the British Parliament.*

This conclusion of the Constitutional Convention that the Legislature was to have no power to refuse to seat a duly elected member who meets all the constitutional qualifications did not flow from dry or technical considerations on the part of the Founders. It reflected a deep concern that the vesting of any power in the Legislature to modify or alter the strict constitutional qualifications for membership

⁸ The clear intention of the Enactors to restrict Congressional power to "judge" the "qualifications" of its members to the constitutionally enumerated qualifications is evidenced throughout the Convention proceedings. For example, Prof. Warren points out:

"It is, moreover, especially to be noted that the provisions that 'each House shall be the judge of . . . the qualifications of its own members' did not originate with this Convention. Such a provision was found in the State Constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, and South Carolina. It was taken originally from William Penn's charter to Pennsylvania of 1701, which provided that the Assembly 'shall have power to choose a Speaker and their other officers, and shall be judges of the qualifications and elections of their own members.' Each of the State Constitutions contained provisions establishing many qualifications for members of the Legislature—residence, age, religion, property and others (qualifications expressed in both affirmative and negative terms); and it was with reference to possession of such qualifications that their Legislatures were authorized to judge as to their members. *There is, so far as appears, no instance in which a State Legislature, having such a provision in its Constitution, undertook to exclude any member for lack of qualifications other than those required by such Constitution.*" [Emphasis added] Warren, *supra*, at pp. 423-4.

in either House would be "improper and dangerous" to the first principles of representative government. Madison, Farrand, Vol. 2, p. 249.

As Madison warned, any deviation from this strict concept would "subvert the Constitution", Farrand, Vol. 2, p. 249. To permit a Legislature to control in any way the qualifications of elected representatives of the people was the path by which "a Republic may be converted into an aristocracy or oligarchy." Farrand, Vol. 2, p. 249.

This powerful conviction of the Founders that "the qualifications of elected representatives of the people were fundamental articles in a Republican Government and ought to be fixed by the Constitution," [remarks of Mr. Madison, Farrand, Vol. 2, p. 249] reflected a determination on the part of the Enactors to guarantee that recent activities of the British Parliament "subversive of the rights of" the British people never be tolerated in this country. Thus Mr. Madison "observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or religious parties" Farrand, Vol. 2, p. 250.

As Professor Warren points out, "Madison's reference was undoubtedly to the famous election case of John Wilkes, in England, who had been rejected three times as a member by the House of Commons" Warren, *supra*, p. 470. Perhaps in no other case is the admonition of Mr. Justice Holmes so appropriate that a "page of history is worth a volume of logic". *New York Trust Co. v. Eisner*, 256 U.S. 345, 349. In the deepest sense of the word the contemporaneous

⁹ See Parliamentary Debates, 22 George III, 1411, discussed, *infra*, at pp. 39 *et seq.*

struggles in England of John Wilkes against a "legislative tyranny" which "infringed more and more upon the fundamental rights of the electorate of England", Wittke, *The History of English Parliamentary Privilege* (Ohio State Univ. 1921) was the "lesson" Mr. Madison referred to in his comments on the floor of the Philadelphia convention. This "lesson" had seared deeply into the American consciousness and was at the heart of the insistence of the framers of the Constitution that the Legislature must have no power to restrict the free choice of the representatives of the people beyond those qualifications established by the people themselves in the fundamental law of the land.¹⁰

In 1757 John Wilkes had been elected member of Parliament for Aylesbury. On April 23, 1763, he issued the famous Number 45 of the *North Briton* attacking the government over the peace treaty with France, charging that bribery was used to secure pliant cooperation with the Commons. A general warrant was issued for his arrest, and although he was freed by the Court of Common Pleas on the grounds of parliamentary immunity, he was brought to trial before King's Bench on charges of sedition and obscenity. Prior to the trial he was expelled, on January 20, 1764, from the House of Commons by a large majority on the grounds of his publication of Number 45.¹¹

Rather than stand trial, Wilkes fled to France and the court adjudicated him in contempt and passed a sentence of outlawry. In 1768 Wilkes returned to England announcing his candidacy for Member from Middlesex County. At the March 28 elections he was overwhelmingly elected over two opponents. Following an extraordinary public demonstration in London in his support, culminating in the famous

¹⁰ See this Court's discussion of the significance of the struggles of John Wilkes upon the emergence of fundamental freedoms in *Watkins v. United States*, 354 U.S. 178, at pp. 190, 191.

¹¹ Postgate, "That Devil Wilkes" (New York 1929), pp. 11, 51-53, 82.

Massacr  of St. George's Fields, the charge of outlawry was dismissed, but he was sentenced to twelve months in prison on the original seditious libel charge. On February 3, 1769, the House of Commons voted to exclude him from the House on the grounds of "incapacity of John Wilkes, Esq. to be elected a Member to serve in said parliament."¹² He was promptly returned, unopposed, by his constituency on February 16, 1769. On February 17, 1769, the Commons excluded Wilkes a second time declaring once again his "incapacity" to sit as a Member. On March 16, 1769, Wilkes was again elected by his constituents by a vote of 1,143 over one Henry Luttrell, who had received 296 votes. On March 17, 1769, the House for the third time excluded Wilkes, this time declaring Luttrell the elected member.¹³

Wilkes was released from prison in 1770, became Lord Mayor of London and resumed his seat in the House in 1774. From 1774 until 1780, in every session of Parliament he introduced and conducted bitter struggles to expunge from the records of the House the three prior resolutions of exclusion, culminating in his ultimate victory in 1782. In the course of these struggles the concepts which Wilkes insisted upon, the fundamental right of the electorate to choose their own representative free from the control of the legislature and subject only to qualifications set by established law, became a burning issue in the American Revolution. As one of the most eminent historians of British and American relations at the time of the Revolution recently wrote:

"The cry of 'Wilkes and Liberty' echoed loudly across the Atlantic ocean as wide publicity was given to every step of Wilkes' public career in the colonial press The reaction in America took on significant

¹² Postgate, *supra*, p. 88.

¹³ Postgate, *supra*, p. 146, *et seq.*

proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty They named towns, counties, and even children in his honor. Finally, colonial ceremonies commemorating the repeal of the Stamp Act held by the Sons of Liberty in Boston, New York, and elsewhere during the period 1768-1770, repeatedly raised the toast, 'Wilkes and Liberty.' " Lawrence H. Gipson, Vol. XI, *The British Empire Before the American Revolution* (New York, 1965) ¹⁴

The struggle of Wilkes against the arbitrary right of a legislature to reject elected representatives of the people who otherwise meet the qualifications of law became intertwined with America's own cause. As a leading biographer of Wilkes wrote:

"It was a matter of common agreement at the time that the resistance of Wilkes to oppression had an immediate effect upon America The popularity of Wilkes has left its mark on the map of America. Wilkes County in Georgia has disappeared, but Wilkes county in North Carolina has Wilkesboro as its chief town, and Wilkes-Barre in Pennsylvania commemorates both him and Col. Isaac Barre . . . Children were named after him."

"Names like Quincy, Hancock, and Adams now bulk enormous in American history; Wilkes is forgotten. But here [in the surviving correspondence between

¹⁴ It is indicative of the American identification of the cause of Wilkes with their own struggle that a popular song of the Revolutionary Period, entitled "Fish and Tea" linked the name of Wilkes together with the other most prominent and beloved English supporters of the American cause, the Earl of Chatham, Edmund Burke, Lord Camden, Colonel Isaac Barry, and Sergeant Glynn [Wilkes' chief advisor and counsel]. See *Diary of the American Revolution*, compiled by Frank Moore and edited by John Anthony Scott (N.Y., 1967).

Wilkes and the Sons of Liberty] they are small men patiently soliciting the attention of a great one They formed in the eyes of the world but one section of the great mass of supporters of Wilkes and they would not at this time have objected to the description of themselves as Wilkesites." Postgate, *That Devil Wilkes* (New York, 1929) ¹⁵

The cause which Wilkes had become identified with—the right of free men to select their own representative subject only to restrictions of fundamental law—was recognized in the mother country itself as at the very center of the struggle for American independence.¹⁶

¹⁵ The Boston Sons of Liberty wrote to Wilkes in 1768 to congratulate him on his return to England from exile and his second election. Here, in part, is what they said:

"The friends of Liberty, Wilkes, Peace and good order, assembled at the Whig Tavern, Boston, New England, take the first opportunity to congratulate your country, the British Colonies, and yourself on your happy return to the land, alone worthy of such an inhabitant. Worthy! as they have lately manifested an incontestable proof of virtue in the honorable and important trust reposed in you by the county of Middlesex."

Benj: Kent
Thos: Young
Benj: Church

John Adams
Jos. Warren

The Sons of Liberty to John Wilkes, Boston, June 6, 1768. See Postgate, *supra* at pp. 11-12.

See also Bancroft, *History of the United States*, Vol. III (1879 ed.) "The cry for 'Wilkes and Liberty' was heard in all parts of the British dominion", at p. 373.

¹⁶ In the course of the parliamentary debate in 1781 on the question of expunging the exclusion resolution, the debates report:

"Mr. Turner said, that the resolution complained of [the exclusion of Wilkes] was no subject of merriment. It had in fact been one of the great causes which had separated this country from America. It had given the colonies just reason to distrust the parliament of Great Britain. After such a resolution they could no longer consider them as the constituents of the people, but the packed adherents of a profligate ministry. Was not the suspicion but too well founded? . . . They were

The concepts underlying Wilkes' struggle for the freedom of selection of their representatives by the people, limited only by fundamental law, reflected the very essence of the principles Madison insisted upon on the floor of the Philadelphia Convention. In an address to the freeholders of Middlesex after his second exclusion from Parliament, Wilkes wrote:

"If ministers can once usurp the power of declaring who shall *not* be your representatives, the next step is very easy and will follow speedily. It is that of telling you, whom you *shall* send to Parliament, and then the boasted Constitution of England will be entirely torn up by the roots." Postgate, *The Sons of Liberty to John Wilkes*, Boston, 1768.

The debates in the Commons, resulting eventually in 1782 in the expunging of the resolutions of exclusion, expressed the concept which Madison said must be the "lesson worthy of our attention." Farrand, Vol. 2, p. 250.¹⁷ The funda-

no more to be considered as the representatives of the people. He called upon them with the anxious concern, to rescue themselves from the imputation of such vassalage, and in doing this they would more effectually invite the Americans to a return of their confidence, than by any other step whatever." *Parliamentary Debates*, 21 George III, 100 (1781).

¹⁷ A few excerpts from the Parliamentary debates urging the expunging of the Wilkes exclusion resolutions highlight those principles which the Founders drew upon in Philadelphia in concluding that no power must be vested in the legislature to refuse to seat an elected representative of the people who meets the qualifications for office established by constitutional law. Consider, for example, these statements made on the floor of Commons in 1775:

"But, Sir, I beg leave to assert, that this was not the case in the Middlesex business. Mr. Wilkes was qualified by the law of the land:

"This House, Sir, is created by the people, as the other is by the king. What right can the majority have to say to any county, city, or borough, you shall not have a particular person to be your rep-

mental idea underlying the Philadelphia conclusions flowed from a deepfelt belief that the right to choose a representative is an inherent right of the people which can be re-

representative, only because he is obnoxious to us, when he is qualified by law? Every county, city, or borough, has an equal right with all other counties, cities, and boroughs, to its own choice, to its own distinct deputy in the great council of the nation. Each is free and independent, invested with precisely the same powers." Parliamentary Debates, 15 George III, 366 (1775).

Or in these ringing words of Mr. Wilkes in arguing for the expunging of the exclusion resolution:

"In the first formation of this government, in the original settlement of our constitution, the people expressly reserved to themselves a very considerable part of the legislative power, which they consented to share jointly with a King and House of Lords. From the great population of our island this right could not be claimed and exercised personally, and therefore the many were compelled to delegate that power to a few, who thus were chosen their deputies and agents only, their representatives. It follows directly from the very idea of a choice, that such choice must be free and uncontrouled, admitting of no restrictions, but the law of the land, to which the King and the Lords are equally subject, and what must arise from the nature of the trust. . . . The freedom of election is, then, the common right of the people of England, their fair and just share of power; and I hold it to be the most glorious inheritance of every subject of this realm, the noblest, and, I trust, the most solid part of that beautiful fabric, the English constitution. . . . The House of Peers, Sir, in the case of *Ashby and White* in 1704, determined, 'a man has a right to his freehold [by the common law; and the law having annexed his right of voting to his freehold] it is of the nature of his freehold, and must depend upon it.' On the same occasion likewise they declared, 'it is absurd to say, the elector's right of chusing is founded upon the law and custom of parliament. It is an original right, part of the constitution of the kingdom, as much as a parliament is, and from whence the persons elected to serve in parliament do derive their authority, and can have no other but that which is given to them by those that have the original right to chuse them.' The greatest law authorities, both ancient and modern, agree in the opinion, that every subject of the realm, not disqualified by law, is eligible of common right. . . . This common right of the subject, Sir, was violated by the majority of the last House of Commons; and I affirm, that they, and in particular, if I am rightly informed, the noble lord with the blue ribband, committed by that act high treason against *Magna Charta*. This House only without the interference of the other parts of the legislature, took upon them to make the law. They

stricted only by the fundamental law made by the people themselves. This was the heart of the Wilkes argument:

"The laws of the land are of no avail, when this House alone can make a new law, adapted to the caprice, violence, or injustice of every emergency, and when representation in parliament no longer depends upon the choice of the electors . . . Can there be a more solemn mockery of the rights of a free people?" Parliamentary Debates, 16 George III, 1339 (1776).

"Where, however, there is no *natural or legal disability, the capacity of being elected is the inherent right of every freeman of the realm*. He cannot be divested of it without an equal injury to the party, and to the

adjudged me incapable of being elected a member to serve in that parliament, although I was qualified by the law of the land, and the noble lord declared in this House, 'if any other candidate had only six votes, he would seat him for Middlesex.' I repeat it, Sir, this violence was a direct infringement of Magna Charta, high treason against the sacred charter of our liberties. The words to which I allude, ought always to be written in letters of gold: 'No freeman shall be dis-seized of his freehold, or liberties, or free customs, unless by the lawful judgment of his peers, or, by the law of the land.' By the conduct of that majority, and of the noble lord, they assumed to themselves the power of making the law, and at the same moment invaded the rights of the people, the King, and the Lords. The two last tamely acquiesced in the exercise of a power, which had been in a great instance fatal to their predecessors, had put an end to their very existence; but the people, Sir, and in particular the spirited freeholders of this country, whose ruling passion is the love of liberty, have not yet forgiven the attack on their rights. So dangerous a precedent of usurped power, which may in future times be cited and adopted in practice by a despotic minister of the crown, ought to be expunged from the Journals of this House." Parliamentary Debate, 15 George III, 361-363.

[It is of some passing interest that the Wilkes exclusion resolution was cited as authority for the power of the House to exclude Congressman-Elect Powell by the respondents in their brief to the District Court. Brief to the District Court at pp. 25-26.] See also the reliance upon the Wilkes precedent by the respondents in their "compilation of English and American historical material . . ." filed with the Court of Appeals, pp. 15-24.

constituent, in whom the power is constitutionally lodged of determining whom he thinks the most fit and proper person to act for him in the great council of the nation. The declaration of the House therefore, that any man, *duly qualified by law*, shall not be allowed to sit in parliament as a representative of the Commons of the realm, was assuming to themselves the making of a new law, to which only the three estates are adequate. It was disfranchising a whole county, and consequently in effect the united kingdom. . . . It is scarcely possible Sir, to state a question in which the people of this free country are more materially interested than in the right of election, for it is the share, which they have reserved to themselves in the legislature. When it was wrested from them by violence, the constitution was torn up by the roots." (emphasis added) Parliamentary Debates, 16 George III, 1338

The exclusion of an elected representative on grounds not stated in the fundamental law was, in Wilkes' words, a usurpation of the power of the people which, as Madison warned in Philadelphia, was subversive of a free constitution:

"By this arbitrary and capricious vote the House established an incapacity unknown to the laws of the land. It is a direct assuming of the whole legislative power, for it gives to the Resolution of one House the virtue of an act of the entire legislature to bind the whole. The King, the Lords, the Commons of the realm, suffer alike from this usurpation. It effectually destroys both the form and essence of this free constitution. The right of representation is taken away by this vote. It is difficult, Sir, to decide, whether the despotic body of men, which composed the last rotten parlia-

ment, intended by the whole of their conduct in the Middlesex elections to cut up by the roots our most invaluable franchises and privileges, or only to sacrifice to the rage of an incensed court one obnoxious individual. In either case the rights of the nation were betrayed by that parliament, and basely surrendered into the hands of the minister, that is, of the crown.

"We are, Sir, the guardians of the laws. It is our duty to oppose all usurped power in the King or the Lords. We are criminal, when we consent to the exercise of any illegal power, much more, when we either exercise, or solicit it, ourselves. . . . This declaration, in my opinion, transfers from the people to this House the right of election, and by an uncontroled exercise of the negative power, the House in effect assume the positive right of making whom they please the representatives of the people in parliament." Parliamentary Debates, 17 George III, 193

The danger which Madison and the Founders saw in a doctrine which would give to a legislature the power to reject representatives of the people otherwise qualified by law echoed the dangers eloquently warned against by Wilkes in the House of Commons:

"This usurpation, if acquiesced under, would be attended with the most alarming consequences. If you can reject those disagreeable to a majority, and expel whom you please, the House of Commons will be self-created and self-existing. You may expel till you approve, and thus in effect you nominate. The original idea of this House being the representative of the Commons of the realm will be lost. The consequences of such a principle are dangerous in the extreme. A more forcible engine of despotism cannot be put into the

hands of a minister." Parliamentary Debates, 15 George III, 368.

In 1782, five years before the Philadelphia Convention, the long battle of John Wilkes to vindicate the elementary rights of the British electorate to choose freely representatives otherwise qualified by fundamental law culminated in a motion carried by the House of Commons expunging the resolutions of exclusion "as being subversive of the rights of the whole body of electors of this Kingdom." Parliamentary Debates, 22 George III, 1411.¹⁸

The Framers of Article I, Clause 2 and Article I, Clause 5 thus found the "taproots" of these clauses in the parliamentary struggles of John Wilkes. Cf. Mr. Justice Frankfurter in *Tenney v. Brandhove*, 341 U.S. at 372. These constitutional provisions are understandable, this Court has taught, "once they are related to the presuppositions of our political history." *Tenney v. Brandhove*, supra at p. 372. Viewed in the light of the history of the Wilkes controversy, the "lesson" Mr. Madison called "worthy of our attention,"¹⁹ it becomes overwhelmingly clear that the intention of the Framers was that the Legislature was to be utterly

¹⁸ The resolution is reported in the debates in this manner:

"Lord Mahon, Lord Surrey, sir P. J. Clerke, and the Secretary at War spoke also for the motion: the House at last divided, when there appeared for expunging, 115; against it 47. The same was expunged by the clerk accordingly. It was then ordered, 'That all the declarations, order, and resolutions of this House, respecting the election of John Wilkes, esq. for the county of Middlesex, as a void election, the due and legal election of Henry Laws Luttrell, esq. into parliament for the said county, and the incapacity of John Wilkes, esq. to be elected a member to serve in the said parliament be expunged from the Journals of this House, as being subversive of the rights of the whole body of electors of this kingdom.'"

¹⁹ Compare George Bancroft's characterization in his famous history of the United States of the "lesson" of the Wilkes affair. "In disfranchising Wilkes by their own resolution, without authority of law, they violated the vital principle of representative government." Bancroft, *History of the United States*, Vol. IV, p. 157.

without power to refuse to seat a representative duly elected by the people who otherwise meets all constitutional qualifications for office. The recent conclusions of an eminent English historian seem peculiarly relevant and sadly ironic when related to the present case:

“Over the Middlesex election, Wilkes seems to us so obviously right that we cannot understand a government disputing it. Had the precedent been established that a member could be elected not by his constituents but by a majority of his own party in the House of Commons, there are no limits to the use which might have been made of it . . . By arousing the people of England in defense of their right to elect their own representatives, Wilkes insured that no government would ever again infringe it.” Charles C. Trench, *Portrait of a Patriot* (London, 1962)

- (iii) *The period of ratification of the Constitution reveals that it would not have been adopted if the ratifying conventions had believed that the Constitution gave to the Legislature any power to refuse to seat an elected representative of the people who met the qualifications for membership in either house explicitly set forth in the Constitution itself.*

The history of the period of ratification of the product of the Philadelphia convention by the state ratifying conventions reveals clearly that if the vast unfettered discretion lodged in the House to refuse to seat a duly elected Representative who meets all expressly stated constitutional requirements for membership urged now by respondents,²⁰ had in fact been the intention of the Framers in writ-

²⁰ See Brief for Respondents in the District Court at pp. 32, 33. See also “Compilation of English and American historical material . . .” filed by respondents with the Court of Appeals.

ing the Constitution, "it would not have been ratified." *Newberry v. United States*, 256 U.S. 232 (1920).

a) It is often forgotten that when the document which emerged from the Philadelphia convention was submitted to the states for ratification, "few of its authors and supporters imagined that it would be easy to win such a margin for approval in the chaotic political circumstances of the world's first experiment in popular government over an extended area: all recognized that a clear-cut vote against the Constitution in any one of four key states would be enough by itself to destroy their hopes for 'a more perfect union.'"²¹ New York was such a state "that plainly could be lost and yet had to be won."²² With this in mind, Alexander Hamilton, enlisting the efforts of James Madison and John Jay, wrote a series of newspaper essays designed to "explain and support the proposed Constitution."²³ These essays, now known to posterity as the *Federalist Papers*, not only have always "commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States,"²⁴ but reflect the analysis of the meaning of the Constitution by its most prominent supporters which in their opinion was essential to obtain the support of the key states upon whose decisions the hope for ratification rested.²⁵

With this understanding of the significance of these essays the analysis in the *Federalist Papers* of the limitations

²¹ Professor Clinton Rossiter, *Introduction to the Federalist Papers*, the *Federalist Papers* (April 1961, Mentor Book edition) p. vii. See also Cecelia M. Kenyon, editor, *The Anti-Federalists* (N. Y., 1966) p. xevii and Edmond S. Morgan, *The Birth of the Republic, 1763-1789* (Chicago, 1956) pp. 149 to 155.

²² Rossiter, *supra*, at p. ix.

²³ Rossiter, *supra*, at p. ix.

²⁴ Rossiter, *supra*, at p. vii.

²⁵ Rossiter, *supra*, at p. viii.

of the power set by the Constitution upon the Legislature to refuse to seat a duly elected representative of the people who meets all the express qualifications set by that document itself assumes special significance. Alexander Hamilton faced this question head-on in Number Sixty of the Papers. In meeting the fear of many that the new Constitution provided preference for the "wealthy and the well-born," Hamilton countered this deep-seated distrust of the proposed Constitution by writing the following words:

"The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. *But this forms no part of the power to be conferred upon the national government.* Its authority would be expressly restricted to the regulation of the times, the places, the manner of elections. *The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.*"²⁶ (Emphasis added)²⁷

²⁶ Federalist Papers, No. 60 (Mentor edition), p. 371.

²⁷ See also James Madison's words in Number 52 of the Federalist Papers, at p. 326:

"The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, *have been very properly considered and regulated by the convention.* A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election, be an inhabitant of the State he is to represent; and, during the time of his service, must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to property or wealth, or to any particular profession of religious faith." (emphasis added)

This analysis in the Federalist Papers of the central constitutional question in this case emphasizes clearly that the limitations upon the power of the legislature to refuse to seat a duly elected representative of the people who meets the qualifications for office set by the people themselves in the fundamental compact is no minor technical question concerning housekeeping duties of the House—but was at the storm center of one of the most critical eras in our history, the moment of decision as to whether the “world’s first experiment in popular government”²⁸ would be accepted by the new nation.

b). As Professor Rossiter points out in his recent analysis of the ratifying period, the State of New York was pivotal to the success or failure of ratification.²⁹ The analysis of the constitutional limitations on the power of the House, advanced in and accepted by the New York State Ratification Convention is accordingly of great significance, for, as Professor Rossiter concludes, “plainly it was a state in which arguments voiced in public debate or actions taken in the ratifying convention might influence the course of events in other states.”

Alexander Hamilton assumed leadership in the New York convention in urging ratification. In expounding upon the fundamental principles underlying the new Constitution he stressed the concept which was the bedrock of his interpretation of Article One, Clause 2, and Article One, Clause 5, contained in Number 60 of the Federalist Papers. In

²⁸ Rossiter, *supra*, p. viii.

²⁹ “One of these states was New York, among whose claims to a vital role in the affairs of the new republic were a growing population, a lively commerce, a pivotal position on the Atlantic seaboard, and New York City, then the seat of the government of the United States. It was also the home of Governor George Clinton, a doughty politician whose principles and prejudices and skills made him the most formidable of opponents to the proposed Constitution. Plainly New York was a state that could easily be lost and yet had to be won.” Rossiter, *supra*, p. viii.

words which illuminate the deep significance of the case now before this Court, Hamilton said to the New York convention:

*"After all Sir, we must submit to the idea, that the true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."*³⁰ (emphasis added)

No words could more clearly express the basic first precepts of our system of government which the action of the House on March 1st of 1966 has now placed in jeopardy. The importance of this analysis by Hamilton that "the true principle of a republic is that the people should choose whom they please to govern them" was highlighted by Hamilton's insistence in defending the concept that Senators were then to be chosen by state legislatures, that the choice of members of the House was to be solely within the power of the people themselves, for, as he said, "Here, Sir, the people govern; here they act by their immediate representatives."^{30a}

Again, Robert Livingston, a powerful supporter of the Constitution,³¹ placed in the sharpest terms the concept

³⁰ Elliot's Debates, Book I, Vol. II (Lippincott Co., 1836), reprinted in limited edition by the Michie Company, Charlottesville, Va., 1941), p. 257.

^{30a} Elliott's Debates, *supra*, at p. 348.

³¹ Robert R. Livingston (1746-1813) was one of the most substantial of the New York landowners, politically one of the first men of the State during the Revolutionary era, and a member of the Continental Congress. He was first Secretary of State for Foreign Affairs, and later Minister to

which lies at the very heart of this case:

"The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights."³²

The refusal of the House to seat the duly elected representative of the people of the 18th Congressional District of New York, who by the House's own findings met all the qualifications for membership in that body which the people themselves established in the fundamental law, was an action wholly beyond the power of the House. In the words of Livingston, relying upon which the people of the State of New York ratified the Constitution, the exclusion of Petitioner Powell by the House "abridge[d] their natural rights."

c) Pennsylvania was another critical state in securing ratification. In this convention, James Wilson, later Justice of this Court, stressed the critical significance of the constitutional provisions which left solely to the people the choice of their representatives subject only to qualifications set by the people themselves in the Constitution. He pointed out that this was the postulate which lies first at the very foundation of all authority whatsoever which is vested in the national government. Thus Mr. Wilson argued to the Pennsylvania convention:

"All authority, of every kind, is *derived by REPRESENTATION from the PEOPLE, and the DEMOCRATIC principle is carried into every part of the government.*"

(Italics and capitalization are in the original Elliot Debate journals.)³³

the Court of France. He is perhaps best known as one of the most distinguished Chancellors of New York. See George Dangerfield, *Chancellor Robert R. Livingston of New York* (N. Y., 1960).

³² Elliot's Debates, *supra*, at pp. 292, 293.

³³ Elliot's Debates, *supra*, at p. 482.

In this succinct statement Mr. Wilson, later Mr. Justice Wilson, captured the essence of the thinking which lay behind the original Philadelphia decisions.³⁴ The authority, the dignity, the very power itself, of the House of Representatives, lies in the fact that it must be composed of representatives who reflect the unfettered free choice of the people, undictated to, uncontrolled, and subject only to qualifications which the people themselves have established in their original solemn compact. [Cf. speech of Mr. Livingston in the New York ratifying convention, *supra*, at p. 51.] An affirmation of these principles, established in the Philadelphia convention and reasserted in the ratifying conventions, far from infringing upon the dignity of the House (cf. Respondent's brief in the District Court at p. 39), would strengthen and solidify the foundation postulates upon which the dignity, power, and prestige of that House ought rightly to rest.³⁵

(d) Another state which held the balance of ratifica-

³⁴ James Wilson (1742-1798) was a delegate to the Continental Congress from Pennsylvania in 1775 and a signer of the Declaration of Independence. He was a member of the Philadelphia Constitutional Convention and a member of the Pennsylvania ratifying convention. He was one of the first Justices of this Court. He was the first Professor of Law in the University of Pennsylvania in 1790. See *Harper's Encyclopedia of United States History* (N. Y., 1905), Vol. 10, pp. 398, *et seq.*

³⁵ It is most interesting that in the same speech in which Wilson expressed the above observations he made amply clear his firm conviction that when the legislature intruded into this area of power restricted to the people from which the very power of the legislature stems that "under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. This I hope, sir, to explain clearly and satisfactorily. I had occasion on a former day, to state that the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles, and find it to be incompatible with the superior power of the Constitution—it is their duty to pronounce it void." *Elliot's Debates, supra*, p. 440.

tion in its hands was Virginia. Facing the intense opposition of Patrick Henry and other champions of popular democracy the pro-Constitution forces rallied their strongest arguments. Once again the free unhindered right of the people to choose their own representatives subject only to qualifications they themselves set in the Constitution become a central theme in the arguments of those supporting ratification. In response to the charges that the new document was aristocratic in nature and violated the principles of democracy,³⁶ Mr. Nicholas³⁷ relied upon the following interpretation of Article One, Clause Two, to meet head-on the anti-ratification arguments:

"Secondly, as it respects the qualifications of the elected. It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the Legislature. *This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence which create a certainty of their judgment being matured, and of being attached to their state.*³⁸ (Emphasis added.)

Nothing could be clearer from the implications of the Virginia convention debates that if the interpretation of Article One, Clause Two, and Article One, Clause Five, urged upon the lower courts as a rationale for a broad unbounded discretion in the House to refuse to seat a duly

³⁶ See for example speech of Mr. Henry, Elliot's Debates, *supra*, Vol. III, p. 43 *et seq.*

³⁷ Wilson Carey Nicholas (1757-1830), was an officer in the Revolutionary War, Commander of Washington's Life Guard, United States Senator in 1799 to 1804, Member of Congress in 1807 and Governor of Virginia from 1814 to 1817. *Harper's Encyclopedia of U.S. History*, Vol. 6, p. 465.

³⁸ Elliot's Debates, *supra*, Vol. III, at p. 8.

elected representative who meets all constitutional qualifications was in fact the intention of the Framers, the Constitution "would not have been ratified" by Virginia. See *Newberry v. United States, supra*, at p. 256.

The history of the ratifying conventions and in particular those held in New York, Pennsylvania and Virginia, a defeat in any one of which would have destroyed the hopes "for a more perfect Union"³⁹ reveals that perhaps no more persuasive argument was advanced to lay to rest the fears of many that the new experiment was designed to usurp the powers of the people, than the repeated assertion of the proponents of the new Constitution, most eloquently expressed in the words of Hamilton before the New York Convention that the proposed fundamental law reflected fully the "true principle of a republic—that the people should choose whom they please to govern them"—"that representation is imperfect in proportion as the current of popular favor is checked" and that accordingly, "this great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."⁴⁰

The experiences of these crucial ratifying conventions reinforce beyond any question the careful conclusion of Professor Warren based upon the history of the Philadelphia Convention that "the Convention did not intend to grant to either branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members other than those qualifications established by the Constitution itself," and that "the elimination of any power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualification."⁴¹

³⁹ Rossiter, *supra*, at p. viii.

⁴⁰ Elliot's Debates, *supra*, p. 257.

⁴¹ Warren, *supra*, at pp. 421, 422. In the Court of Appeals the respondents were careful to "avoid arguments" on the constitutional merits of the action of the House in excluding the petitioner. Thus they stated "we do

This constitutional conclusion, in the words of Hamilton,

not discuss in this brief the 'merits' of the controversy—i.e., whether the House acted properly in excluding Mr. Powell"—Appellant's Brief at pps. 13, 14. However, they filed a document with the Court of Appeals entitled "compilation of English and American historical material from the Fifteenth Century to the adoption of the Constitution of the United States relating to the exclusive power of legislatures to judge the qualifications of their members." While respondents studiously avoided arguing what they termed the "merits" of the House's action they "lodged" this document with the Clerk apparently to substantiate their opinion offered despite their disavowal of arguing the "merits"—that "there is substantial historical and legal basis for the conclusion the House reached." Appellant's Brief at p. 14 (Footnote). The impact of this "historical material" may be weighed in light of several rather unusual assertions in this document which we suggest the Court may be interested in examining: 1) Professor Warren's authoritative conclusions concerning the constitutional Convention are brushed aside on the rather astounding suggestion that this eminent and recognized scholar of the Convention probably did not have "access to all the sources which we have been able to review". Not content with this unusual comparison between the lifetime studies of the leading American constitutional scholar and the time available to the attorneys for the House who compiled this document, the further suggestion is made that "we doubt that he [Professor Warren] . . . in preparing his monumental survey of the entire constitutional scheme . . . could possibly have found time to review the original source material". Appellee's Document lodged with Clerk of Court of Appeals, at p. 1. We "doubt" that Professor Warren's scholarly expertise requires defense in this Court. See *Bond v. Floyd*, 385 U.S. 116, Footnote 13. 2) The central precedential historical authority for the assumption of an unlimited power to exclude duly elected representatives who otherwise meet the constitutional qualifications for membership is found in the action of the British Parliament in excluding John Wilkes. Appellee's Document, *supra*, at pps. 15 to 26. We find it extraordinary, if revealing, that respondents even inferentially, rely for historical sanction upon the "lesson" which Mr. Madison said was "worthy of our attention"—an "abuse", which he warned if followed here would vest "an improper and dangerous power in the Legislature", and "abuse" which could "by degrees subvert the Constitution". See pps. 34 to 46, *supra*. Perhaps nothing more sharply reveals the constitutional infirmity in the action of the House than respondent's reliance upon the precedent of the Wilkes exclusion by the House of Commons, an action one of the most eminent historians of the early days of the Republic, George Bancroft, saw fit to characterize as a violation of "the vital principle of representative government". Bancroft, *History of the United States*, Vol. IV, p. 157. 3) Finally it is perhaps significant to note that the opinions of Madison and Hamilton in the Federalist Papers are brushed aside by the unusual suggestion that The Federalist is a "piece of very special pleading"; a quotation

is "the true principle of a republic".⁴³ It reflects as Chancellor Livingston said to the New York ratifying convention the axiom which underlies our entire theory of government—that "the people are the best judges who ought to represent them."⁴⁴ This was the understanding upon which the people of the State of New York ratified the Federal Constitution. For the House to refuse to seat a representative of the people of this State, duly elected by his fellow citizens, and who admittedly, and by finding of the House itself, "possesses the requisite" constitutional qualifications for membership in the House, is to violate the original understanding underlying the basic compact. In the words of Chancellor Livingston it "is to abridge—the natural right" of the people the bedrock right the Constitution sought to protect—to "choose whom they please to govern them."

The preservation of this compact—the protection of the fundamental law which has established those principles which "the people have an original right to establish" and which "in their opinion, shall most conduce to their own happiness . . . so established, are deemed fundamental" is the highest duty of this Court to perform. *Marbury v. Madison*, 1 Cranch 137. In ratifying the Constitution the people of the several States were assured that their "natural right" to choose representatives "whom they please to govern them" was written into the fundamental law. This Court has proudly stated that the government of the United States, established by this written Constitution, "has been

taken somewhat out of context from Professor Rositter's introduction to *The Federalist*. Cf. his statement in the introduction that the essays have always "commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States." Rositter, *supra*, at p. vii.

⁴³ Elliot, *supra*, at p. 257.

⁴⁴ Elliot, *supra*, at p. 292.

emphatically termed a government of laws and not of men." *Marbury v. Madison*, *supra*, at p. 162. No higher responsibility is placed upon this Court when citizens of New York turn here "to claim the protection of the laws" *Marbury v. Madison*, *supra*, at p. 162, for a violation of the "natural right" to choose whom they please to govern them, a right they were solemnly assured was contained within the written Constitution. In perhaps no case in the recent history of the Court has it been more awesomely clear that if "the laws furnish no remedy for the violation" of this fundamental right—for this breach of the original covenant—this government of ours "will certainly cease to deserve this high appellation"—that it is truly "a government of laws and not of men." *Marbury v. Madison*, *supra*, at p. 162.

- (iv) *This Court has consistently reaffirmed the conclusion that the House has no constitutional power to refuse to seat a duly elected representative of the people who meets all the qualifications for membership set forth in the Constitution.*

The central constitutional questions presented by this appeal and the fundamental premises underlying the limitation upon legislative power adopted by the Philadelphia Convention and reflected in the ratifying conventions have been authoritatively discussed by this Court and only recently vigorously reaffirmed.

In *Newberry v. United States*, 265 U.S. 232 (1920), the Court had the occasion directly to reaffirm the conclusion of the Philadelphia Convention that the House has no power under the Constitution to vary in any way the qualifications for membership in the House set forth in the Constitution. This discussion occurred in both the majority opinion of the Court and the concurring opinions of Mr. Justices Pitney, Brandeis and Clarke. Significantly, while the

majority and concurring Justices disagreed on the main issue of the case—whether a primary election fell within the meaning of the word “Elections” in Article I, Section Four—all the Justices specifically agreed upon the proposition that this legislature had no constitutional power to alter in any way the qualifications for membership in either House expressly set forth in the Constitution.

In Mr. Justice McReynolds’ opinion for the Court, 256 U.S. at 243 (joined in by Mr. Justice Holmes, Mr. Justice McKenna, and Mr. Justice Day) the position is squarely taken that the legislature has no power to deviate from or alter qualifications for membership in either House set forth in the Constitution. Thus the opinion for the Court states, at p. 255:

“Section Four was bitterly attacked in the State Conventions of 1787-1789, because of its alleged possible use to create preferred classes and finally to destroy the States. In defense, the danger incident to absolute control of elections by the States and the express limitations upon the power, were dwelt upon. Mr. Hamilton asserted: ‘The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked upon other occasions are defined and fixed in the Constitution and are unalterable by the Legislature.’ The Federalist, LIX, LI. The history of the times indicates beyond reasonable doubt that, if the Constitution makers had claimed for this section the

latitude we are now asked to sanction, it would not have been ratified. See Story on the Const. §§814, et seq.⁴³ 256 U.S. at p. 255-256.

The concurring opinion of Mr. Justice Pitney, joined in by Mr. Justice Brandeis and Mr. Justice Clarke is equally emphatic in reaffirming Hamilton's conclusions that the Philadelphia Convention intended that the legislature was to have no power to add, alter, or vary the constitutional qualifications for membership in either House. Thus the concurring opinion also adopts approvingly the statements and analysis of Hamilton in Number 60 of the Federalist Papers:

"What was said, in No. 60 of the Federalist, about the authority of the National Government being *restricted* to the regulation of the time, the places, and the manner of elections, was in answer to a criticism that the national power over the subject 'might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others,' as by discriminating 'between the different departments of industry, or between the different kinds of property, or between the different degrees of property'; or by a leaning 'in favor of the landed interest, or the monied interest, or the mercantile interest, or the manufacturing interest;' and it was to support this contention that there was 'no method of securing to the rich the preference apprehended but by prescribing qualifi-

⁴³ The opinion of the Court proceeds to make it unmistakably clear which are the constitutional qualifications for membership in the House which are "defined and fixed" and "unalterable by the legislature" in its subsequent comment at page 256, "Who should be eligible for election was also stated. 'No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected, be an inhabitant of that State in which he shall be chosen.'" 256 U.S. at p. 256.

cations of property either for those who may elect, or be elected,' which formed no part of the power to be conferred upon the national government, that Hamilton proceeded to say that its authority would be 'expressly restricted to the regulations of the *times*, the *places*, and the *manner* of elections.' This authority would be as much restricted, in the sense there intended if 'the manner of elections' were construed to include all the processes of election from first to last. The restriction arose from the express qualifications prescribed for members of House and Senate, and for those who were to choose them; subject to which all regulations of preliminary, as well as of final, steps in the election necessarily would have to proceed." 256 U.S. at 283-284.

The unanimous agreement of the Court in *Newberry* as to the constitutional limitations upon the power of the legislature to alter, vary or deviate from the qualifications for membership in the House, set forth in the Constitution itself, was explicitly reaffirmed in 1940 in *United States v. Classic*, 313 U.S. 299. The opinion in *Classic* resolved the specific issue as to whether primary elections were "elections" subject to regulation by Congress within the meaning of Section 4 of Article I. This question, the Court pointed out, had "not been prejudged" by the prior decision in *Newberry*. *United States v. Classic*, 313 U.S. at 317.⁴⁴

In *Classic*, the Court, in the opinion of Mr. Justice Stone, repeatedly reaffirmed and restated the fundamental premises which grounded the unanimous conclusion of the Court in *Newberry*—that the legislature may not interfere with the free choice of representatives who meet constitutional

⁴⁴ See also 40 Mich. L. Rev. 460 (1941); 36 Ill. L. Rev. 475 (1941); 10 Geo. Wash. L.R. 625 (1941).

qualifications for membership in the House. In words reminiscent of the tone of the statements of the Founders, Mr. Justice Stone reminded the Nation once again:

"That the free choice by the people of representatives in Congress, *subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution*, was one of the great purposes of our constitutional scheme of government cannot be doubted." 313 U.S. at 316. (Emphasis added.)

As Mr. Justice Stone wrote, "... a dominant purpose of Section 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives . . . to safeguard the right of choice by the people of representatives in Congress secured by Section 2 of Article I," *United States v. Classic, supra*, at pp. 318, 320.⁴⁵

The unanimous views of the Justices in *Newberry* concerning the constitutional prohibition upon legislative power to alter or disregard constitutional qualifications for membership reaffirmed by the discussion in *Classic*, was

⁴⁵ Only recently in *Stassen for President Citizens Committee v. Jordan*, 377 U.S. 914, in a case in which the issue raised was unrelated to the constitutional questions presented in this appeal, in their dissent from the denial of the petition for writ of certiorari, 377 U.S. at 927, Mr. Justice Douglas, the Chief Justice, and Mr. Justice Goldberg saw fit to restate the powerful words of Mr. Justice Stone in *Classic* that "the free choice by the people of representatives in Congress, subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted" at p. 978. This reference to the statement in the *Classic* majority opinion, by Mr. Justice Douglas who dissented in *Classic*, emphasizes the obvious point that the *Classic* dissenting judges, Mr. Justice Douglas, Mr. Justice Black and Mr. Justice Murphy did not base their dissent from the result of the case upon any disagreement with Mr. Justice Stone's formulation of the fundamental constitutional question which is decisive in the present appeal.

once again reflected in the opinion of the Court in *Bond v. Floyd*, 385 U.S. 116, in the 1966 Term of Court.

The unanimous opinion in *Bond v. Floyd* reflects a logical extension of the analysis of the Court expressed first in *Newberry* and reaffirmed in *Classic*. In understanding the teaching of the Court in *Bond* in respect to the fundamental constitutional proposition at issue in this appeal it is helpful to examine first the thoughtful dissenting opinion of Chief Judge Tuttle below which became in a significant manner the foundation stone upon which this Court's opinion in *Bond* rests.

Chief Judge Tuttle's direct holding was that the Georgia Legislature had no power to refuse to seat Representative-Elect Bond since he met all the stated qualifications set forth in the Georgia Constitution. This Court would seem to assume the soundness of the threshold proposition (see footnote 13 to the Court's opinion), and proceeds to meet Georgia's secondary argument that the legislature was merely testing one of the *constitutional* qualifications—the requirement of taking the constitutional oath. The Court's opinion disposed of this contention by concluding that the effort of the legislature to “look beyond the plain meaning of the oath provisions,” in order to determine whether the Representative-Elect “may take the oath with sincerity,” violated the First Amendment to the Federal Constitution.

Chief Judge Tuttle in his opinion disposed of the basic constitutional issue in a forthright manner. In the face of a concession by the State that the Representative-Elect met all the stated qualifications for membership in the House, compare the concession here by the House that petitioner met all the constitutional qualifications for membership, Chief Judge Tuttle remarked:

“In the absence of a strong showing of judicial interpretation to the contrary, it would seem that simple

justice would require a holding that where specific qualifications are stated for an office and the Legislature is given the power to judge whether an aspirant for the office is 'qualified,' the legislature as judge, should be required to look to the stated qualifications as the measuring stick. To hold to the contrary and permit the House as judge to go at large in a determination of whether Representative Elect "A" meets undefined, unknown and even constitutionally questionable standards shocks not only the judicial, but also the lay sense of justice."

Chief Judge Tuttle then explained in a clarifying manner a question which has seemed to confuse many commentators in the past as to why there have been few direct legal precedents exactly on the issue. He pointed out:

"It can be readily understood why there are few legal precedents to give guidance in such a situation. In the first place, it can be assumed that members of a state or national legislature are prone to recognize the right of the electorate to choose as the representative whom they want to serve them. Thus, there may not be expected to be many clear precedents. Further, it is readily apparent that in those cases in which a legislative body has exceeded its authority the shortness of the term of office may make moot any contest in court." 251 F. Supp, 333, 352.

Because of the understandable paucity of judicial opinions, Chief Judge Tuttle relied heavily upon the legislative precedents we discuss *infra* at pp. 73. However, in addition, he placed great emphasis upon the once-famous, but now rarely remembered, Report of the Association of the Bar of the City of New York in 1920 under the Chairman-

ship of Charles Evans Hughes, later Chief Justice of this Court. This Special Committee included such distinguished representatives of the American bar as Joseph M. Proskauer, Ogden L. Mills, Morgan J. O'Brien and Louis Marshall. The Committee was appointed at the time of the expulsion of five members of the Socialist Party from the New York State Assembly. Its mandate from the Bar Association was to "appear before the Assembly or its Judiciary Committee and take such action as is required to safeguard and protect the principles of representative government guaranteed by the Constitution which are involved in the proceedings now pending." The Committee filed a brief with the Assembly stating that they regarded "these proceedings as inimical to our institutions, because they tend to subvert the very foundation upon which they rest—representative government."

Chief Judge Tuttle singled out for consideration the conclusion of this eminent committee of American lawyers concerning the critical constitutional question as to the power of a legislature to exclude a duly elected member for grounds other than expressly stated in the Constitution.⁴⁶

"We contend that the opinion expressed by Senator Knox in the Case of Senator Smoot,"⁴⁷ *supra*, correctly defines what is meant by qualification. The constitution expressly specifies a number of disqualifications. . . . The principle of constitutional interpretation applicable to this phase of the subject was elaborated in classic phrase by Chancellor Sanford in *Barker v. People*, 3 Cowen, 703, which, although decided in 1824,

⁴⁶ Although the Committee made it plain in its reports that the New York Assembly action was an action for *expulsion* rather than one to determine the qualifications of its members, it felt that it was critical, because of legislative and public confusion on this point, to state its views on the power of a legislature to judge the "qualifications" of elected members. See *Bond v. Floyd*, *supra*, at p. 353.

⁴⁷ See p. 97, *infra*.

and therefore involving the interpretation of an earlier Constitution, is nevertheless as applicable in principle to the present Constitution: 'Eligibility to public trust, is claimed as a constitutional right, which cannot be abridged or impaired. The Constitution established and defines the right of suffrage; and gives to the electors and to their various authorities, the power to confer public trust. . . . *Excepting particular exclusions thus established, the electors and the appointing authorities are, by the Constitution, wholly free to confer public stations upon any person, according to their pleasure. The Constitution giving the right of election and the right of appointment, these rights consisting . . . essentially in the freedom of choice; and the Constitution also declaring that certain persons are not eligible to office; it follows from these powers and provisions, that all other persons are eligible. Eligibility to office is not declared as a right or principle, by any expressed terms of the Constitution; but it results, as a just deduction, from the expressed powers and provisions of the system. The basis of the principle, is the absolute liberty of electors and the appointing authorities, to choose and to appoint any person, who is not made ineligible by the Constitution . . . I, therefore, conceive it to be entirely clear that the Legislature cannot establish arbitrary exclusions from office or any general regulation requiring qualifications, which the Constitution has not required' . . ."* (Emphasis supplied by Chief Judge Tuttle.)

Brief of Special Committee appointed by the Association of the Bar of the City of New York, January 20, 1920.

Based upon all of these considerations, Chief Judge Tuttle concluded as a matter of law that "it is clear that

Bond was found disqualified on account of conduct not enumerated in the Georgia Constitution as a basis of disqualification. This was beyond the power of the House of Representatives" 251 F. Supp. 333, at 357.

As we have pointed out above, this Court does not appear to disagree with Chief Judge Tuttle's conclusion as to the basic constitutional question involved. Quite to the contrary, in the course of its refutation of Georgia's secondary line of defense that all it was doing was *testing* a constitutional qualification—the necessity of an oath supporting the Constitution—the Court saw fit to remind the Nation of the fundamental policy reasons which led the Framers to conclude that the qualifications of members of either House are "defined and fixed by the Constitution" and "are unalterable by the legislature." Thus the Court restated in full in Footnote 13 of the opinion these conclusions of the Framers:

Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views. At the Constitutional Convention of 1787, Madison opposed a proposal to give to Congress power to establish qualifications in general. Warren, *The Making of the Constitution* (1938), 420-422. The Journal of the Federal Convention of 1787 states:

"Mr. Madison was opposed to the Section as vesting an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Government and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution . . . Qualifications founded on artificial distinction may be devised, by the stronger in order to keep out partisans of a weaker faction.

“ ‘Mr. Madison observed that the British Parliament possessed the power of regulating the qualifications both of the electors; and the elected: and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties.’ 2 Farrand, *The Records in the Federal Convention of 1787* (Aug. 10, 1787), pp. 249-250.

“Hamilton agreed with Madison that:

“ ‘The qualifications of the persons who may choose or be chosen * * * are defined and fixed by the constitution: and are unalterable by the legislature.’ The *Federalist*, No. 60 (Cooke ed. 1961), 409.”

The entire structure of the *Bond* opinion confirms the impression that the Court was fully in accord with these conclusions of the Framers that the qualifications of representatives of the people are defined and fixed by the Constitution and are unalterable by the Legislature. This Court pointed out that as to “the only stated qualifications for membership in the Georgia legislature—the State concedes that Bond meets them all” 385 U.S. 16. And in this Court, Georgia did not argue at any length that a legislature has unbounded discretion to set new standards and qualifications for membership.⁴⁸ Instead the entire *Bond* opinion is predicated upon an assumption by both the Court and the State that the Legislature was indeed, bound by the stated constitutional qualifications. Unlike the re-

⁴⁸ Cf. the contentions of the respondents below in their brief, at page 34.

spondents in this case,⁴⁹ Georgia did not "claim that it should be completely free of judicial review", 87 S. Ct. at 346. It sought to convince the Court that its action of exclusion was based upon the testing of a *proper* constitutional qualifications—the necessity of taking an oath. The Court rejected this argument by pointing out that disqualifications even "under color of a proper standard" is reviewable and beyond the power of the House if it violates other constitutional prohibitions—in that case the First Amendment.

The entire posture of the *Bond* case in this Court would tend to confirm the observation of the Chief Judge of the Fifth Circuit that the argument that a Legislature may disregard, enlarge upon, or alter the express constitutional qualifications for a duly elected member of the Legislature "shocks not only the judicial, but also the lay sense of justice." *Bond v. Floyd*, 251 F. Supp. 333 at page 352.⁵⁰

⁴⁹ On oral argument before the Court of Appeals on the motion for summary reversal, counsel for the respondent took the position that the House was free of judicial review regardless of the grounds of exclusion even including exclusion on the basis of race, religion, or politics. See transcript of oral argument on file in this Court. See Point II, *infra*.

⁵⁰ The decisions in the state courts uniformly followed the principles enunciated in this Court from *Newberry* to *Classic* to *Bond*—that a Legislature has no power to add to, alter or disregard constitutional qualifications for office whether in respect to the national Congress or state offices in which constitutional qualifications have been set. See, for example, *Imbrie v. Marsh*, 3 N.J. 578, 71 A.2d 352 (1950): "... to ask the question is to answer it, for if the Legislature may alter these oaths or any other provisions of the Constitution prescribing the qualifications for office (such as age, citizenship, residence and prohibition of dual office holding) it would to the extent of such variance nullify the Constitution. The maxim *expressio unius est exclusio alterius*, is peculiarly applicable here. Such has been the current not only of decisions in this State and elsewhere but of the authorities on public law. 'When the constitution prescribes the manner in which an officer shall be appointed or elected, the constitutional prescription is exclusive, and it is not competent for the legislature to provide another mode of obtaining or holding the office.' *Johnson v. State*, 59 N.J.L. 535, 536, 538, 37 A. 949, 950, 39 (1896), at p. 356; *Buckingham v. State*, 42 Del. 405, 35 A.2d 903 (1944): "It is the general law that where a constitution creates an office and prescribes the qualifications that the incumbent must possess, that the legislature has

- (v) *The most recent decisions of this Court emphasize that the right of the people to choose freely and without restraint their representatives to the Congress is of the essence of a democratic society.*

This Court in recent years has again and again emphasized that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative democracy"; *Reynolds v. Sims*, 377 U.S. 533 (1964) (opinion of Chief Justice Warren). See also *Harmon v. Forsennius*, 380 U.S. 528 (1965). The reason the right to exercise the franchise in a "free and unimpaired manner", this Court has taught, "is a fundamental matter in a free and democratic society" is because it is "preserva-

no power to add to these qualifications. 1 Cooley's Constitutional Limitation, 8th Ed., 140; Meecham on Public Offices, Secs. 65 and 98; Throop on Public Offices, Sec. 73; Annotations, 47 A.L.R. 481 and 97 Am. Dec. 264." at p. 906; *Whitney v. Bolin*, 85 Ariz. 44, 330 P.2d 1003 (1958): "It is our opinion that the constitutional specifications are exclusive and the legislature has no power to add new or different ones."; *People v. McCormack*, 261 Ill. 413, 103 N.E. 1053 (1914): "Where the Constitution declares the qualifications for office, it is not within the power of the Legislature to change or add to them, unless the Constitution gives that power. 'It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office it meant to exclude all others as prerequisites. From the very nature of such a provision the affirmation of these qualifications would seem to imply a negative of all others.' 2 * A power to add new qualifications is certainly equivalent to the power to vary them." 1 Story on the Constitution, § 625. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the Constitution. Eligibility to office, therefore, belongs not exclusively, or especially to electors enjoying the right of suffrage; it belongs equally to all persons whomsoever, not excluded by the Constitution. I therefore conceive it to be entirely clear that the Legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications, which the Constitution has not required. 11, for example, it should be enacted by law that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts, or that all persons not possessing a certain amount of property should be excluded or that a member of the assembly must be a freeholder, any such regulation

tive of other basic civil and political rights". *Reynolds v. Sims*, at page 562.⁵¹

would be an infringement of the Constitution; and it would be so, because, should it prevail, it would be in effect, an alteration of the Constitution itself." *Burroughs v. Lyles*, 142 Tex. 704, 181 S.W.2d 570; "The qualifications for the office of State Senator are set out in Article III, Section 6, of the Constitution, Vernon's Ann. St. It was held by this Court in *Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1012, that where the Constitution prescribes the qualifications for office it is beyond the legislative power to change or add to the qualifications, unless the Constitution gives that power. That decision was reaffirmed in *State ex rel. Candler et al. v. Court of Civil Appeals et al.*, 123 Tex. 549, 75 S.W.2d 253. The statute here involved seeks to impose an additional test of eligibility other than what is prescribed by the Constitution, on a candidate for State office, and for that reason it is void." *Campbell v. Hunt*, 18 Ariz. 442, 162 P. 882 (1917): "The qualifications for Governor are specifically detailed in the Constitution, and the Legislature is therefore powerless to add to or detract from the qualifications prescribed. No citation of authority is necessary here." See, also, to the same effect: *Hellman v. Collier*, 217 Md. 93, 141 A.2d 908 (1958); *Shub v. Simpson*, 196 Md. 177, 76 A.2d 332 (1950); *Stockton v. McFarland*, 56 Ariz. 138, 106 P.2d 328, 330 (1940); *State ex rel. Johnson v. Crane*, 65 Wyo. 189, 197 P.2d 864 (1948); *Eaton v. Schmahl*, 140 Minn. 219, 167 N.W. 481 (1918); *Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918); *Ekwall v. Stadelman*, 146 Ore. 439, 30 P.2d 1037 (1934); *O'Sullivan v. Swanson*, 127 Neb. 806, 257 N.W. 255 (1934); *In re O'Connor*, 173 Misc. 419, 17 N.Y.S. 2d 758, 759 (1940); *Sundfor v. Thorson*, 72 N. Dak. 246, 6 N.W. 2d 89, 90 (1942); *Watson v. Cobb*, 2 Kan. 32, 58 (1863); *Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W. 2d 504 (1946); *Graham v. Hall*, 73 N.D. 428, 15 N.W. 2d 736, 740-41 (1944); *Chenoweth v. Acton*, 31 Mont. 37, 77 P. 299, 302 (1904); *Chambers v. Terry*, 40 Cal. App. 2d 153, 104 P. 2d 663, 666 (1940); *Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1012, 1015 (1924); *Broughton v. Pursifull*, 245 Ky. 137, 53 S.W. 2d 200, 203 (1932); *Mississippi County v. Green*, 200 Ark. 204, 138 S.W. 2d 377, 379 (1940); *Kivett v. Mason*, 185 Tenn. 558, 206 S.W. 2d 789, 792 (1947); *Wallace v. Superior Court*, 141 Cal. App. 2d 771, 298 P.2d 69 (1956).

⁵¹ See, in this connection, *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964), (opinion of Mr. Justice Black for the Court): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory, if the right to vote is undermined", at p. 535. See also *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (opinion of Mr. Justice Douglas): "Long ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 370, the Court referred to 'the political franchise of voting' as a 'fundamental political right, because preservative of all rights'", at p. 667. See also the recent opinion of the Court in *Williams v. Rhodes* (#533, October Term, 1968).

This understanding of the significance of the right to elect freely a representative of one's own choice has led the Court to restate in fundamental terms the reasons of policy underlying the original decision of the Philadelphia Convention that the Legislature was to be without power to disregard, alter or add to the qualifications for membership in either House. In *Reynolds*, the Chief Justice placed the postulate considerations of a democratic society which govern the grave constitutional issues raised in this appeal in these forceful words:

"As long as ours is a representative form of government and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."

Reynolds v. Sims, supra, at page 562.⁵²

Only recently the Court has seen fit to reemphasize the fundamental nature of the right of the citizenry to "cast

⁵² The same concepts were recently expressed by Mr. Justice Fortas, joined in by the Chief Justice and Mr. Justice Douglas in their opinion in *Fortson v. Morris*, — U.S. —, "A vote is not an object of art. It is the most sacred and most important institution of democracy and of freedom. In simple terms, the vote is meaningless—it no longer serves the purpose of the democratic society—unless it, taken in the aggregate with the votes of other citizens, results in effectuating the will of those citizens, provided that they are more numerous than those of differing views. That is the meaning and effect of the great constitutional decisions of this Court.

In short we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose. If the vote cast by all of those who favor a particular candidate exceeds the number cast in favor of a rival, the result is constitutionally protected as a matter of equal protection of the laws from nullification except by the voters themselves. The candidate receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis . . . 'the right to vote is too important in our free society to be stripped of judicial protection' by any other interpretation of our Constitution." (emphasis added).

their votes effectively". *Williams v. Rhodes*, — U.S. —, (#543, 544, October Term, 1968, opinion of Mr. Justice Black for the Court). In striking down obstacles to the free choice of electors for the Presidency by the voters of a state, the Court reminded the Nation that this right "rank[s] among our most precious freedoms". In his concurring opinion Mr. Justice Douglas wrote in words directly applicable here "at the root of the present controversy is the right to vote—a 'fundamental political right' that is 'preservative of all rights' . . . the rights of expression and assembly may be illusory if the right to vote is undermined' "

This fundamental importance to all other rights of the right to vote for one's representative in government was reflected in the insistence of Mr. Justice Fortas, joined in by the Chief Justice and Mr. Justice Douglas in their opinion in *Fortson v. Morris*, — U.S. —, —, that "we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose . . ." "that the candidate receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis." For as the Justices pointed out "the right to vote is too important in our free society to be stripped of judicial protection by any other interpretation of our Constitution" — U.S. —, —.

In short, what is here involved is what has been characterized in other circumstances as a "mainspring of representative government". *Baker v. Carr* at p. 249. Fundamental to all other considerations, all other doctrines, all other rights and liberties, is the right of the people to select freely and unencumbered their representatives in the governing legislative bodies. This is the first principle of representative democracy. It is, in the words of Mr. Justice Clark in *Baker v. Carr* "the keystone upon which our government

was founded and lacking which no republic can survive", *Baker, supra*, at 267. If this principle is subverted all other rights, including the dignity and authority of the legislature itself, are undermined. It is in this sense that the issues in this case far transcend the rights of the individual petitioners, as important as they are. They touch, in the words of the Court in *Reynolds*, the "bedrock of our political system".

(vi) *The most important and persuasive precedents of the House and Senate have always acknowledged the constitutional limitations upon their own power to exclude duly elected representatives of the people who meet all the constitutional qualifications for membership in either body.*

With the exception of the extraordinary events culminating in the exclusion of petitioner Powell, the House itself, as well as the Senate, has in its most important and persuasive cases time and again acknowledged the constitutional limitations upon their power to exclude duly elected representatives of the people who meet all the constitutional qualifications for membership in either body.⁵³

The first occasion on which the implications of Article I, Clause 2, and Article I, Clause 5 were fully debated in the House was in 1807, only twenty years after the Constitutional Convention. In the contested election case of *William McCreery*, Tenth Congress, 1807, 1 Hinds § 414, the House, after "exhaustive debate," 1 Hinds p. 381, affirmed the man-

⁵³ In a handful of occasions, among the many times the question has been before the House, the constitutional limitations were ignored. In the case of *Brigham Roberts*, 56 Congr. 1899, 1 Hinds, Sect. 474, discussed *infra* at pp. 96, and the case of *Victor Berger*, 66 Congr., 58 Congr. Rec. (1919), discussed *infra* at pp. 97, the principles expressed in both cases, arising in a wave of national hysteria, were later repudiated by the House itself. See *Bond v. Floyd*, 251 F.S. 333 at 345 (opinion of Chief Judge Tuttle).

date established at the Philadelphia Convention that the constitutional qualifications of age, citizenship and in habitation were the sole qualifications for membership in the House. Thus, the Chairman of the Committee on Elections placed in this manner the proposition later affirmed by the full House:

“The Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislature are vested with authority to add to those qualifications, so as to change them. That the State Legislatures cannot prescribe the qualifications of their own members is evident, it is believed from their respective constitutions; and that they are authorized to judge of the qualifications of their own members by their own constitutional rules only, and of the election of their own members by their respective election laws, must be admitted. Congress, by the Federal Constitution are not authorized to prescribe the qualifications of their own members, but they are authorized to judge of their qualifications; in doing so, however, they must be governed by the rules prescribed by the Federal Constitution, and them only. These are the principles on which the Election Committee have made up their report, and upon which these resolution is founded.” *Annals of Cong.*, Nov. 1807, p. 872.

The case arose on the question of whether the Representative-elect, though qualified according to the Federal Constitution to take a seat in Congress, should be denied that seat because he did not meet an additional requirement set

for Congressmen by the Constitution of his state. In announcing its adherence to the constitutional mandate that the House could not refuse to seat a Member-elect who met all constitutional qualifications, the House acknowledged certain fundamental guidelines imposed upon it by the Constitution:

a) "The people had delegated no authority to the States or to the Congress to add to or diminish the qualifications prescribed by the Constitution." 1 Hinds at p. 382. See in particular Annals of Congress for the 10th Congress, pp. 872, 875, 887-88, 893, 895, 909, 910, 915-16.

b) "If they could do this [deviate from strict constitutional qualifications] any sort of dangerous qualifications might be established—of property, color, creed, or political professions." 1 Hinds at p. 382; Annals of Congress for the 10th Congress, pp. 873, 878, 895, 980-09, 913.

c) "The people had a natural right to make a choice of their Representatives, and that right should be limited only by a convention of the people, not by a legislature." 1 Hinds at p. 382, Annals of Congress for the 10th Congress, pp. 873-74, 875, 895. Accordingly, the House voted to seat the Congressman-elect after finding that he possessed the constitutional qualifications, holding that these qualifications are exclusive and the sole requirements for taking the seat. Annals of Congress for the 10th Congress, pp. 878, 910, 911-12, 914, 918.

These principles, responsive to the constitutional mandate established only twenty years previously, reflected an understanding on the part of the members of the House in the first days of the Republic that what is here involved is the most fundamental principle of a democratic society—the right of the people to freely elect their own representatives. Thus Representative Desha expressed the deep-felt senti-

ments of the House underlying its actions in this precedent-making decision when he said:

"On this occasion, the question was whether . . . any State Legislature, or any other power of legislation, could add qualifications to any member of that House . . . every contraction of qualifications for Representatives was an abridgement of the liberty of the citizens. The power of adding other qualifications than those fixed by the Constitution would . . . be a breach of the right of suffrage. . . . We are placed here as guardians of the people's rights and privileges. Do not then let us hold out with one hand a fair appearance of zeal for the rights of the people and the public good, and at the same time take every advantage imaginable with the other, by curtailing their Constitutional privileges, and, instead of allowing the people a complete range to select a man worthy of representing them in Congress, confine them to certain situations. I dislike this kind of political hypocrisy. I dislike anything that looks like sporting with the rights of the people, with the rights of those that I consider the firm supporters of the republican fabric."⁵⁴

This case in the House, arising in the earliest days of the Republic, has of course great importance, for, as Chief Justice Taft said in *Myers v. United States*, 272 U.S. 52, 175 (1926), "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions."

⁵⁴ Annals of Congress for the 10th Congress.

The fact that the Congress "acquiesced in" this acceptance of the constitutional mandate "for a long term of years," see *Myers v. United States*, *supra*, is evidenced in the contested election cases of *Turney v. Marshall* and *Fouke v. Trumbull* in the 34th Congress, 1856, 1 Hinds, p. 384. In these cases the House reaffirmed after full debate the principles of the earlier decisions recognizing that the Constitution requires the seating of Congressmen-elect upon a showing of the presence of the constitutional qualifications for membership in the House. The report of the Election Committee, presented by Representative John A. Bingham (R. Ohio),⁵⁵ re-emphasized these understandings.

a) "The qualifications of a Representative, under the Constitution, are that he shall have attained the age of 25 years, shall have been seven years a citizen of the United States, and when elected, an inhabitant of the state in which he shall be chosen. It is a fair presumption that when the Constitution prescribes these qualifications as necessary to a Representative in Congress it was meant to exclude all others." 1 Hinds, at p. 385.

b) "By the Constitution, the people have a right to choose as Representative any person having only the qualifications therein mentioned, without superadding thereto any additional qualifications whatever." 1 Hinds, at p. 386.

c) "To admit such a power [to deviate from the sole constitutional qualifications] . . . is to prevent altogether the choice of a Representative by the people." 1 Hinds, at p. 385.

⁵⁵ Rep. John A. Bingham has been recognized as one of the most eminent constitutional lawyers of the House, and is well known as one of the primary Framers of the XIVth Amendment to the Constitution.

The Committee concluded that a failure to seat a Congressman-elect who met all the constitutional qualifications for membership in the House would be "absolutely subversive of the rights of the people under that Constitution." 1 Hinds, at p. 886.⁵⁵

These controlling concepts were once again forcefully restated by the Senate in the *Case of Benjamin Stark*, 37th Congress (1862), 1 Hinds, § 433. The Senator-elect was challenged on the ground that he had engaged in conduct "very unbecoming and very reprehensible in a loyal citizen." Cong. Globe, p. 861. In opening the debate for the majority of the Election Committee, Senator Harris placed the fundamental constitutional propositions which limit the power of the Senate:

"The question submitted to the committee was whether or not evidence of this description could be allowed to prevail against his *prima facie* right to take his seat as Senator. The committee were of opinion that they could not. The Constitution declares what shall be the qualifications of a Senator. They are in respect to his citizenship; and the committee were of opinion that the Senate were limited to the question, first, whether or not the person claiming the seat and presenting his credentials produced the requisite evidence of his election or appointment; and second, whether there was any question as to his constitutional qualifications."

⁵⁵ Cf. Resolution of House of Commons expunging resolutions of exclusion of John Wilkes, *supra*, at p. 45. The decision of the House in *Turney v. Marshall* was adhered to by the Senate in a parallel situation in the *Case of Trumbull*, 34th Congress, 1 Hinds, § 416, p. 387, in which the Senate held that constitutional qualifications could not be added to. In the later case of *Wood v. Peters*, 48th Congress (1884), 1 Hinds, § 417, p. 387, the House specifically reaffirmed the principles set forth in Representative Bingham's report for the Election Committee in *Turney v. Marshall*, finding that "the authorities cited place the question involved in this case beyond the realm of doubt." 1 Hinds, at p. 389 (emphasis added).

Certain Senators eloquently urged that the dignity of the Senate required an investigation into the "unbecoming" and "reprehensible" prior conduct of the Senator-elect. Senator Harris responded for the Election Committee in words which reflected an understanding of the underlying principles first enunciated in the Constitutional Convention:

"[It is suggested that] when a man comes to take his seat here, the Senate can inquire into his former life, see what his conduct has been, whether he has been guilty of crime or not; and if, in the judgment of the Senate, he has been guilty of crime or misconduct, it can deny him the seat to which he was elected by the proper constituency in order to punish him for his offense! Now, I do not understand that it is competent for the Senate, and I think they step aside from their only jurisdiction when they attempt to punish a man for his crime or misbehavior antecedent to his election. If this were so the Constitution ought to be amended so as to read, that the Legislature of a State, or the Governor of a State, in a certain contingency, shall elect or appoint a Senator, subject to the advice and consent of the Senate. The Senate would then be the ultimate judge whether or not the man ought to have a seat there, and it would be competent for the Senate upon any caprice or any view it might take of the capacity, moral, or intellectual, or political, of a man, to reject him and prevent his taking a seat. Sir, I do not so understand the Constitution. I understand the Senate is the judge of the election of a Senator, of the sufficiency and genuineness of the returns furnished, and the evidence of that election; and also of the constitutional qualifications of the individual to hold a seat in the Senate.

*Beyond that, I apprehend the Senate have no power at all."*⁵⁷ (Emphasis added.)

Upon this presentation of the governing concepts by the Election Committee, the Senate seated the Senator-elect, finding that he had the requisite sole constitutional qualifications. As in the earliest days of the Republic, the Senate once again accepted the concept that the limitation of its power to judge the qualifications of a member-elect to the constitutional qualifications alone was a fundamental protection of the people themselves. For, as Senator McDougall said on the floor of the Senate, "If the Senator from Oregon is denied a seat, it is a denial to Oregon of her constitutional right of representation."

The principles restated by the Senate in the *Case of Benjamin Stark* were shortly thereafter put to a severe test and wholly reaffirmed by the House in the case of *Grafton v. Conner*, in the 41st Congress (1870). Representative-elect Conner was charged with having brutally and severely beaten Negro soldiers under his command while in the

⁵⁷ The debate in the Senate reaffirming the original decisions made in Philadelphia once again reflected fundamental considerations. As Senator McDougall stated, the refusal to seat a constitutionally qualified Senator-elect may be

"one of the heaviest blows that can be struck at the foundation of our republican institutions. This is no common matter of business. It is an assertion of the right of a majority of this body to refuse entrance here to a person clothed with all the miniments of right by a sovereign State, and against whom is alleged no constitutional or legal disqualification. Whose right is it that he should be here? The right of the people of the State of Oregon—their Constitution and the laws of Congress under it, which alone bind them in this matter."

And as Senator Browning declared, such a practice

"is one that is capable of immense abuse, immense wrong; and one which it is within the range of possible things might at some time or other be used for the worst purposes of tyranny. I am not willing to aid in establishing such a precedent."

Armed Forces and, while on trial by court martial on those charges, having bribed witnesses and suborned evidence and perjured himself before the court. Cong. Globe, Part 3, 41st Cong., 2nd Sess. 1869-70, pp. 2322-23. The debate on the floor of the House once again reflected the recognition that the House was bound by the Constitution itself to seat a member-elect who possessed the constitutional qualifications for membership in the House. Thus, Representative Orth stated:

“Turn to the Constitution and see what is prescribed in reference to the qualifications of a member of this House. Mr. Conner has the requisite age. He has the requisite residence. He has the requisite certificate of his election from the proper authorities. The Committee of Elections has so reported, and that settles the *prima facie* case.”

Representative Daws restated the constitutional limitations which govern an investigation by the House under Article I, Clause 5 into the right of a member-elect to be sworn:

“Mr. Speaker, the Committee of Elections of the last Congress had occasion to consider how far it was within their province to consider questions at the threshold, in limine, before a member applying for his seat was sworn in. It arose first on charges brought against members touching their loyalty. The conclusion to which the committee came after very careful examination of this question, and in which they were sustained by the House over and over again, was this: That as to any question which touched the constitutional qualification of a gentleman claiming a seat it was proper that question should be raised at the threshold before he was sworn

in. And it was decided by the last House, when any member, upon his responsibility as a member, made any charge against any claimant to a seat that touched his constitutional qualification, the House, before swearing him in, would refer the question to the proper committee to report on it. Beyond that the Committee of Elections came to the conclusion, and the House sustained them, it was not proper to go. That question of itself was a very delicate one, and of course might be carried to such an extent as to involve great abuse to the rights of persons claiming seats here. *But never did that committee ask the House to go one inch beyond the question of the constitutional qualification of a member, and never did this House decide that we had the right to go one inch beyond that question.*" (Emphasis added.)

The statements of Representative Schenck on the floor of the House powerfully reflect the fundamental concepts of representative democracy which underlie the limitations the Constitution places upon the House:

"I do not understand that is alleged that any of these constitutional qualifications are not possessed by the gentleman who now seeks to be admitted to a seat upon this floor. What then? It is proposed that as he has once been tried by a court-martial, or a court of inquiry, the result of which is alleged to be unsatisfactory, because of some criminal conduct on his part, because of his suborning witnesses, it is proposed that we shall try the case over again, and ascertain whether he is a person of proper moral character to be admitted to a seat upon this floor.

"Sir, break down the rule of the Constitution, once say that you can go outside of the qualifications pre-

scribed by the Constitution as sufficient to entitle a person to membership, and where are we to stop? Every man who presents himself here as member-elect will be liable to have alleged against him some crime, some offense against the laws, and thereupon a trial must be instituted. Every man presenting himself here to be sworn in will, by the force of partisan malignity upon the one side or the other, probably have something of that kind alleged against him in order to have him prevented from taken his seat. And while that may not occur now when the House is so unequally divided between parties, there may come a time when the House will be more equally divided, and this course may be resorted to in order to prevent there being added any more to the members of this House of one part or the other.

“What I wish to say is that we must leave something to the people; and when they have settled all these questions by electing and sending certain persons here, there remains with us nothing but to accept their work.”

The questions posed to the House in this debate which resulted in the seating of the Member-elect penetrate to the essence of the constitutional question involved in the present appeal. The question Representative Schenck asked the House in 1870 is the question Mr. Madison placed to the Founding Convention in 1787. Once the House “breaks down the rule of the Constitution”, where is it to stop? This is the ultimate inquiry which goes to the very heart of representative democracy. As the House itself recognized in 1870, “there may come a time when the House will be more equally divided, and this course may be resorted to in order to prevent there being added any more to the

members of this House of one party or the other." And when this time comes, the very foundations of democratic government are placed in peril and Madison's warning in 1787 that "a Republic may be converted into an aristocracy or oligarchy" may be suddenly real.

Until the unusual events of March 1966 in which the House brushed aside the constitutional advice of its own Select Committee and the respected Chairman of its own Judiciary Committee⁵⁸ the House has in its most recent cases re-

⁵⁸ The Honorable Emanuel Celler, Chairman of the Judiciary Committee of the House, placed the constitutional issue in these terms:

"Some may demand exclusion—ouster at the threshold by majority vote. The Constitution lays down three qualifications for one to enter Congress—age, inhabitancy, citizenship. Mr. POWELL satisfies all three. The House cannot add to these qualifications. If so it could add, for example, a religious test or conceivably deny seats to a minority by mere majority vote.

"Madison and Hamilton were aware of the danger of permitting the House to regulate qualifications. They therefore said the Constitution unalterably fixes and defines qualifications. Madison said that to allow the Congress such power would be improper and dangerous." Cong. Rec. Mar. 1, 1967, H. 1926.

See further the following revealing exchange between Chairman Celler and Representative Corman:

"Mr. Celler: On the matter of exclusion, as I understand it—and I should like to get the gentleman's view—the Constitution provides that there shall be three qualifications—namely, age, citizenship, and inhabitancy—and that the Congress cannot add to those qualifications.

"That has been borne out by the articles of Madison and Hamilton in the Federalist, and borne out by the decision in the Bond case recently decided by the Supreme Court. Am I correct in that?

"Mr. Corman: The gentleman is correct. In our review we noted that at the time of the debate on this provision by the Convention of property ownership ought to be included. The Founding Fathers were very explicit that the sole qualifications should be the three specified in the Constitution. They rejected additions at that time.

"Mr. Celler: These qualifications are set forth explicitly in the Constitution. And if Congress had a right to add to those qualifications then conceivably Congress could prescribe a qualification based, for example, on religion. Am I correct in that?

"Mr. Corman: Yes, sir; the chairman is correct.

"Mr. Celler: There could conceivably be a situation arise in which

vealed a continued acceptance of the fundamental limitations which the Constitution places upon its power to reject duly elected representatives of the people who meet the constitutional qualifications for membership.

The case of *Francis N. Shoemaker*, in the 73rd Congress (1933), contains the latest full discussions on this question in the House of Representatives prior to the debates involving Petitioner Powell. In the Shoemaker debates the House once again reaffirmed its recognition of the fundamental constitutional limitations upon its power here involved.

Representative-elect Shoemaker had been convicted of a crime in Minnesota and had been sentenced to a term in the penitentiary. The House, in seating the Congressman-elect, re-emphasized its basic acceptance of the constitutional mandate that the power of the House lies solely in determining the presence of the qualifications for membership set forth in the Constitution. Finding these qualifications present, and finding that the conviction of the Representative-elect had not deprived him of his "citizenship", the House voted to seat him. 77 Cong. Rec. 131, 132, 133, 134, 136, 139 (1933).

The debate on the floor of the House which resulted in the seating of the Member-elect reflected the continued acceptance of the constitutional limitations first discussed and acknowledged on the floor of that body in the early days of the Republic. The strict constitutional limits upon the power of the House were succinctly placed by Representa-

the majority Members of the Congress could by some device exclude the entire minority membership. Am I correct in that?

"Mr. Corman: Yes, sir.

"Mr. Celler: And that led Hamilton to agree with Madison that:

"The qualifications of the person who may choose or be chosen are defined and fixed in the Constitution; and are unalterable by the Legislature.' (The Federalist, No. 60.)" Cong. Rec. Mar. 1, 1967, H. 1927.

tive Lemke, who led the successful fight for the seating of the Member-elect.

"Mr. Speaker, the question before the House is whether Mr. F. H. Shoemaker is entitled to a seat in this House or whether he is disqualified.

"I make the statement without fear of contradiction that he is not disqualified but is qualified to sit here as a Member of this House under the Constitution of the United States of America and under the rules and regulations of this House.

"In the first place, the qualifications for a Congressman are the following:

No person shall be a Representative who shall not have attained to the age of 25 years, had been 7 years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

"This is the qualification required by the Constitution of the United States."

Representative McKeown sharply synthesized the recognition of the House of the limitations placed upon its power by the Constitution in these words:

"The Constitution says that there are three qualifications for a Member of the House. Neither the State Legislature . . . nor the Congress of the United States can change these qualifications. They are written into the Constitution by the great fathers of the Republic, and they cannot be changed by law."

The most recent and exhaustive discussion reflecting the legislative branch's own recognition of the limitations placed by the Constitution upon its power to exclude duly elected representatives of the people is to be found in the exhaus-

tive Senate debate in the case of *William Langer of North Dakota* in the 77th Congress (1942), S. Journ. 77th Congr. 1st Sess. p. 8 et seq., 2nd Sess. p. 3 et seq: The Senator-elect was challenged at the taking of the oath. The "charges against Langer were numerous and chiefly involved moral turpitude, embracing kickbacks, conversion of proceeds of legal settlements, acceptance of a bribe in leasing government property, and premature payments on contracts of advertising." *Senate Election, Expulsion & Censure Cases*, p. 141. The Senate after full debate seated the Senator-elect.

The debate, which resulted in the seating of the Senator-elect, reflected a fundamental reaffirmation of the constitutional limitations upon the power of the Legislature recognized from the first days of the Republic. The debate reaffirmed the recognition that the constitutional power of the Legislature in Article One, Section Five to "judge" the qualifications of its members is restricted to those qualifications set forth in the Constitution itself. Senator Murdock, who led the successful fight for the seating of Senator Langer, placed the question in words which reflect the basic philosophy underlying the constitutional issues here involved.

"What do we judge? A man comes here and presents his credentials and claims that he has the constitutional qualifications to be a Senator. As judges of that fact, we look at his credentials; we consider his constitutional qualifications. Where do we find them stated? We find them set out in the Constitution. I believe it was contemplated by the framers of the Constitution that when a man came here with credentials from his State, and claimed to have the constitutional qualifications, the matter could be judged by the Senate in not to exceed a week or 2 weeks' time; but when the word

'judge' is construed to mean the power to add qualifications, about which the State does not know, about which the Senate does not know, then, of course, there is brought about the type of farce which resulted in taking 4 years to determine that Reed Smoot was entitled to sit here as a United States Senator, and the type of farce which has resulted in Senator Langer's right to a seat being held in abeyance for more than a year, the committee searching his life almost from childhood up to the present time.

"Oh, did the men who wrote the Constitution ever contemplate that such a thing as that would happen? *In framing the Constitution they had the right to decide what tribunal should be the judge of the morals and the intellectual qualifications of the men sent here, and they decided that the people of the sovereign States should have that power, restricted only by the very definite but simple qualifications enunciated in the Constitution itself.*" Cong. Rec., p. 1947 (emphasis added).

Senator Murdock further carefully defined the meaning of Article One, Section Five so as to exclude any possibility that this Clause justified considerations beyond the express constitutional qualifications.

"Mr. Murdock: I desire to read again the provision—

'Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . .'

To my mind, the word 'judge' means to look at the qualifications contained in the Constitution. That is what the verb 'judge' means: To judge of something in existence—law or facts—and to apply the law to the facts. To extend the definition of the word 'judge' to mean that we can superadd to these qualifications, in

my opinion, is a misconstruction of the word itself.”
 Cong. Rec. 1942, p. 2475.⁵⁹

The following critical exchange between Senator Lucas and Senator Murdock illustrates the original meaning of Article One, Section 5, see Point I, (i), *supra*, now once again reaffirmed by the Legislature itself:

“Mr. Lucas: The Senator referred to article I, section 5. What does he think the framers of the Constitution meant when they gave to each House the power to determine or to judge the qualifications, and so forth, of its own Members.

⁵⁹ An interesting exchange between Senator Murdock and Senator Overton further amplifies this construction of the impact of the word “judge”:

“Mr. Overton: I understand the position taken by the able Senator is that section 5, article I, of the Constitution, which vests in each House the right to judge of elections, returns, and qualifications of its own Members does not vest any authority in the Senate or in the House to add to the qualifications prescribed by the Constitution, and that the word ‘judge’ is not to be interpreted as the word ‘prescribed’ would be interpreted, but means simply that the Senate, in this case, for example, sits as a judge and, as a judge, applies certain well-known provisions of the Constitution and of statutory law to the facts of the case.

“Mr. Murdock: That is my position.

“Mr. Overton: I wish to add one contribution to the argument made by the able Senator—that is, what the Supreme Court of the United States had to say with reference to section 5 of article I, which gives each House the power to judge of the qualifications of its Members. The Supreme Court of the United States, speaking through Mr. Justice Pitney, said:

“The power to judge of the elections and qualifications of its Members, inhering in each House by virtue of section 5 of article I, is an important power, essential in our system to the proper organization of an elective body of representatives. But it is a power to judge, to determine, upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass an arbitrary edict of exclusion.” [Mr. Overton appears to be referring to Mr. Justice Pitney concurring in *Newberry v. United States*, 256 U.S. at 484.]

I think that fully supports the contention made by the able Senator from Utah, and I think it correctly interprets the word ‘judge’ as used in section 5 of article I of the Constitution.”

"Mr. Murdock: I construe the term 'judge' to mean what it is held to mean in its common, ordinary usage. My understanding of the definition of the word "judge" as a verb is this: When we judge of a thing it is supposed that the rules are laid out; the law is there for us to look at and to apply to the facts.

"But whoever heard the word 'judge' used as meaning the power to add to what already is the law?"—
Cong. Rec. 1947, p. 2479.

A recognition of the fundamental wisdom of the refusal of the Founders to permit the Legislature to exclude duly elected members upon its own conception of their "morality" or "unfitness" is reflected throughout the Senate proceedings. Thus, the report ultimately adhered to by the Senate in vindicating the Senator-elect's right to a seat states in words which apply with prophetic insight to the present appeal:

"The power to determine fitness was reserved to the electorate as the best judges of the social intellectual, and moral qualifications of those whom they saw fit to select as their representatives. The makers of the Constitution doubtless balanced the possibility of an unwise choice of the electorate against the possibility that an agency of government, given unrestricted discretion, might, under the masquerade of morality, decide from motives of partisanship, bigotry, or fanaticism."—Cong. Rec. 1947, 2486.

Senator Murdock further explored the basic reasons why the Constitution prohibits any inquiries by the Legislature other than those into the presence of constitutional qualifications:

"Mr. Murdock: I cannot believe that the framers of our Constitution contemplated any such result.

"Now, let us take a further example. If we have the right to go into the moral character or the intellectual ability of a Senator-elect, then do we not have the corresponding duty to do it? Think that over. What would be the results? Every Senator-elect, then, would have his enemies in his own State; we have a right, under the contention of the majority, to go on these fishing trips; if we have the right, we have the duty; and if we have the right and the duty, then what do we become? We become the triers of the moral and the intellectual life of every Senator-elect from the cradle to the time of his election. Who is going to concede that? Who is going to contend for that?"—Cong. Rec. 1947, p. 2489⁶⁰

The critical importance to the preservation of the "bed-rock" of our political system—the principle of representative democracy—was placed in clear and eloquent terms on the floor of the Senate:

"Mr. Milliken: I suggest to the Senator that a representative form of government is the heart of a republican form of government, and when the Senate undertakes to eliminate a newly elected Senator that, instead of guaranteeing a republican form of government, it is destroying a republic form of government.

"Mr. Murdock: I think the Senator is exactly cor-

⁶⁰ An exchange on the floor between Senator Murdock and Senator Pepper further illustrates the principle underlying the *Langer* case:

"Mr. Murdock: . . . I take the position that the Senate has no right under the Constitution to go into the morals of the Senator-elect.

"Mr. Pepper: I see. The Senator construes section 5, or article I, which gives each House the power to judge of the qualifications of its members, to be limited to the things prescribed in the Constitution?

"Mr. Murdock: Yes.

"Mr. Pepper: I thank the Senator.

"Mr. Murdock: The Senator from Florida states the matter very clearly."

rect, and I thank him for his contribution. To say to a sovereign State that by reason of its inherent power the Senate reserves the right to pass on the morals and the intellectual qualifications of the men who are sent here is disruptive of a republican form of government.”
—Cong. Rec. 1947, p. 2481

In concluding his arguments which convinced the Senate to seat the challenged Senator-elect, Senator Murdock restated the persuasive considerations which we have seen underlay the original conclusion of the Founding Fathers that the Legislature has no constitutional power to refuse to seat a duly elected member who meets all constitutional qualifications. Senator Murdock reminded the Senate:

“Is it to be surmised that Madison, who was one member of a committee of three—its members were Madison, Hamilton, and Gouverneur Morris—would be so emphatic with reference to this particular point, and, after retiring in order to put it into immaculate form, would bring it back with the substance changed? No, Mr. President; to make such an assertion is to question the integrity of Madison, a man who fought not for phraseology, not for some technicality, but for substance.⁶¹ The substance was what? That the qualifi-

⁶¹ Senator Murdock is here referring to an argument similar to the one Respondents rely primarily on in their brief submitted to the District Court, consisting of a long discredited theory that because the wording of Article I, Section 2, Clause 2 was framed in the negative, that clause states, not exclusive qualifications for membership but rather minimal disqualifications. This fallacious reasoning has been fully refuted by Professor Charles Warren and rather than discuss it at any length ourselves, perhaps it would be more useful to the Court merely to set forth Professor Warren's carefully formulated rejection of this reasoning:

“An argument to the contrary has been based on the fact that the qualifications, as reported by the Committee of Detail on August 6, were expressed affirmatively, thus: ‘Every member of the House of Representatives shall be of the age of twenty-five at least; shall have

cations of Members of Congress should be specified in the Constitution itself, not left to the discretion of the Congress. Why did he take such a position? *Because*

been a citizen in the United States for at least three years before his election; and shall be at the time of his election a resident of the State in which he shall be chosen' (and similarly as to Senators); whereas, as finally drafted by the Committee of Style on September 12, they were expressed negatively as follows: 'No person shall be a representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen' (and similarly as to Senators). The argument is made that this change, while giving to each House unlimited power to establish qualifications, simply imposed an obligation on them not to admit any persons having the specified *disqualifications*.

"It is to be noted, however, that the Committee of Style had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so; and certainly the Convention had no belief, after September 12, than any important change was, in fact, made in the provisions as to qualifications adopted by it on August 10. That there was no difference in legal effect between a qualification expressed affirmatively and one expressed negatively may be seen from the fact that the Constitution of Massachusetts of 1780 contained affirmative qualifications for Senators as follows: 'Every member of the House of Representatives . . . for one year at least next preceding his election shall have been an inhabitant of and have been seized in his own right of a freehold of the value of one hundred pounds within the town he shall be chosen to represent, or any taxable estate of two hundred pounds.' 'No person shall be capable of being elected as a Senator who is not seized of his own right of a freehold, within the commonwealth, of the value of three hundred pounds at least, or possessed of personal estate to the value of six hundred pounds at least, or both to the amount of the same sum, and who has not been an inhabitant of this Commonwealth for the space of five years immediately preceding his election, and at the time of his election he shall be an inhabitant in the district for which he shall be chosen.' And in each case the Massachusetts Constitution termed them 'qualifications' and empowered the House and Senate to judge them, as follows: 'The Senate shall be the final judge of the elections, return and qualifications of their own members as pointed out in the Constitution.' 'The House shall be the final judge of the elections, returns and qualifications of their own members as pointed out in the Constitution.'

'So, too, in the State Constitutions of New Hampshire of 1784, Pennsylvania of 1776, and South Carolina of 1778, the qualifications of members of the Legislature are expressed in the negative phraseology thus: 'No person shall be capable of being elected'—'no person shall be eligible to sit', etc."

he knew that the fundamental cornerstone of the government of a republic is the people's right to freedom of choice of those who represent them: and Madison knew that the qualifications should be contained in the Constitution and not left to the whim and caprice of the legislature." (emphasis added)

The sweeping reaffirmance of the recognition by the Legislature of the constitutional limitations upon its power to exclude duly elected representatives of the people who meet all constitutional qualifications for membership reflected in the *Langer* case, rested in large measure upon an historic report of the Judiciary Committee of the House of Representatives for the 42nd Congress. This report, issued and approved in the cases of *Ames* and *Brooks*, 42nd Congr., 2 Hinds, p. 866 (1872); was read in full to the Senate in the *Langer* debate by Senators Murdock and Barkley. It states in the most powerful terms the fundamental precepts of our system of government which required the conclusion of the Philadelphia Convention that the Legislature was to have no constitutional power to refuse to seat duly elected representatives of the people who met the qualifications for office set forth in the Constitution itself:

"... The answer seems to us an obvious one that the Constitution has given to the House of Representatives no constitutional power over such considerations of 'justice and sound policy' as a qualification in representation. On the contrary, the Constitution has given this power to another and higher tribunal, to wit, the constituency of the Member. Every intendment of our form of government would seem to point to that. This is a government of the people, which assumes that they are the best judges of the social, intellectual, and moral qualifications of their Representatives, whom they are to choose, not anybody else to choose for them; and we,

therefore, find in the people's Constitution and frame of government they have, in the very first article and second section, determined that 'The House of Representatives shall be composed of Members chosen every second year by the people of the States' not by representatives chosen for them at the will and caprice of Members of Congress from other States according to the notions of the 'necessities of self-preservation and self-purification.'

• • • • •

"Your committees are further emboldened to take this view of this very important constitutional question because they find that in the same sanction it is provided what shall be the qualifications of a Representative of the people, so chosen by the people themselves. On this it is solemnly enacted, unchanged during the life of the Nation, that 'no person shall be the representative who shall not have attained the age of 25 years, and been 7 years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

"Your committees believe that there is no man or body of men who can add or take away one jot or title of these qualifications. The enumeration of such specified qualifications necessarily excludes every other. It is respectfully submitted that it is nowhere provided that the House of Representatives shall consist of such Members as are left after the process of 'purgation and purification' shall have been exercised for the public safety, such as may be 'deemed necessary' by any majority of the House. The power itself seems to us too dangerous, the claim of power too exaggerated to be confided in any body of men; and, therefore, most wisely

retained in the people themselves, by the express words of the Constitution."

This report of the House Judiciary Committee of the 42nd Congress in incisive terms states the very essence of the historic constitutional question raised in this appeal. The selection of the representatives of the people to the houses of the Legislature is not a matter which "has in any measure been committed by the Constitution to the legislative branch of the National Government. *Cf. Baker v. Carr*, 369 U.S. 194, 211. On the contrary, as the Report of the Judiciary Committee acknowledges, this power has by the Constitution, been assigned to "another and higher tribunal," the "people themselves," subject only to such qualifications as the "people themselves" have established in the fundamental law of the land—the Constitution itself. This flows from the basic postulate upon which this experiment in representative government rests—that "this is a government of the people, which assumes that they are the best judges of the social, intellectual and moral qualifications of their Representatives whom they are to choose, not anybody else to choose for them." When the Legislature ignores the constitutional qualifications for membership in the House established by the people and intrudes into the power vested exclusively by the Constitution in the sovereign people to select freely their own representatives, the House has dangerously invaded the powers reserved by the Constitution, and by the philosophy of government it rests upon, to the people themselves.⁶²

⁶² The House has in the past ignored the constitutional limits on its power only on rare occasions and under intense partisan pressure and public hysteria. These isolated cases have been seriously criticized by the House itself and have been subsequently overruled and discarded.

The case of *Brigham Roberts* in the 56th Congress, 1899, 1 Hinds, § 474, involved a member-elect from Utah who was barred from his seat on the ground that he was a polygamist in accord with the Mormon faith

(Footnote continued on next page)

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and had been convicted of violating the federal Edmonds Act prohibiting polygamy. The House, responding to a wave of anti-Mormon feeling throughout the country, barred Roberts despite a strong minority report which reasserted the constitutional principles previously adhered to by the House. Only a few years later the Senate sharply repudiated the *Roberts* action, seating, in the case of *Reed Smoot of Utah*, in the 58th Congress, 1903, 1 Hinds, §§ 481-84, a Senator-elect despite his adherence to the Mormon faith. The Senate forcefully reasserted the controlling constitutional limitation that the sole question before the legislature is the presence of the constitutional qualifications. The Senator who led the fight to exclude Senator Smoot, Senator Taylor, had been the Representative in the House who had engineered four years before the efforts to bar Mormon Representative Roberts. The positions advanced by Senator Taylor in justification of the *Roberts* exclusion were sharply and successfully refuted in the following argument of Senator Knox:

"There is no question as to Senator Smoot possessing the qualifications prescribed by the Constitution, and therefore we can not deprive him of his seat by a majority vote. He was at the time of his election over 30 years of age and had been nine years a citizen of the United States, and when elected was an inhabitant of Utah. These are the only qualifications named in the Constitution, and it is not in our power to say to the States, 'These are not enough; we require other qualifications,' or to say that we can not trust the judgment of States in the selection of Senators, and we therefore insist upon the right to disapprove them for any reason.

"This claim of the right to disapprove is not even subject to any rule of the Senate specifying additional qualifications of which the States have notice at the time of selecting their Senators, but it is said to be absolute in each as it arises, uncontrolled by any canon or theory whatever.

"Anyone who takes the trouble to examine the history of the clause of the Constitution as to the qualification of Senators must admit that it was the result of a compromise. The contention that the States should be the sole judges of the qualifications and character of their representatives in the Senate was acceded to with this limitation: a Senator must be 30 years of age, nine years a citizen of the United States, and an inhabitant of the State from which he is chosen. Subject to these limitations imposed by the Constitution, the States are left untrammelled in their right to choose their Senators. This constitutional provision secures a measure of maturity in counsel, and at least a presumption of interest in the welfare of the Nation and State."

The Senate ultimately determined that because Mr. Smoot possessed the constitutional qualifications he was entitled to his seat. And a subsequent move to expel Senator Smoot failed. See generally, 1 Hinds, § 478, pp. 550-57. Significantly, the House itself, in 1933, in the case of *Shoemaker*, *supra*, pointedly disregarded the *Roberts* case as binding precedent. Similarly, in the *Langer* case, *supra*, the Senate specifically approvingly followed the minority report in *Roberts*.

B. *The punishment of exclusion from membership in the House for the 90th Congress inflicted upon the Petitioner violates Article One, Section 9, Clause 3, providing that "No Bill of Attainder or ex post facto law shall be passed."*

H. Res. 278, which imposed the severe punishment of exclusion from the House of a duly elected Representative who meets all constitutional qualifications for membership, is a classic Bill of Attainder prohibited by Article One, Section 9, Clause 3 of the Constitution. It is "a legislative act which inflicts punishment without a judicial trial. *Cummings v. Missouri*, 4 Wall 277; *United States v. Lovett*, 328

Following the Civil War, in a group of cases, the House barred members-elect who had participated in the Rebellion. See the cases of the *Kentucky Members* in the 40th Congress, 1867. However, it was pointed out in subsequent Congresses that the Congress itself recognized that this action was unconstitutional under Article 1, found it necessary to adopt Section 3 of the Fourteenth Amendment to sanction barring of members elect on this additional ground of loyalty to the Confederacy. See the discussion in the *Langer* case, *supra*, Cong. Rec. 1942, March 16, p. 2484. See also 33 Virginia Law Review 332:

"Were the Senate able to impose qualifications as it saw fit, it would not have been necessary to amend the Constitution to achieve the above result," at p. 332.

The case of *Victor Berger* in the 66th Congress, 58 Cong. Rec. (1919) involved the refusal to seat a Congressman-elect who had been found guilty in World War I of violation of the Espionage Act. The House majority took the position that Berger had in effect committed "treason" which foreclosed his right to hold office under the United States pursuant to the congressional constitutional power to fix the penalty for treason. The majority House report further justified the exclusion of Berger under Section 3 of the Fourteenth Amendment, barring from the office of Representative anyone who has "given aid and comfort to the enemies" of the United States. This exclusion of Berger, a Socialist Congressman, at the height of the post-World War One anti-radical hysteria has been severely criticized. Cf. the opinion of Chief Judge Tuttle of the Fifth Circuit in *Bond v. Floyd*, 251 F. Supp. 333, 345. The Honorable Emanuel Celler, Chairman of the House Judiciary Committee, in the March 1st debate urged strongly the "repudiation" of such precedents as *Roberts* and *Berger*, which reflect the prejudices of prior eras. Chairman Celler urged that "this House should not resurrect a long discredited view of the Constitution and follow precedents bespeaking furor instead of fairness." Cong. Rec., March 1, 1967, H. 1945.

U.S. 303 (1946); *United States v. Brown*, 381 U.S. 437 (1965). It represents, in the recent words of the Chief Justice, "the evil the framers had sought to bar; legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, *supra*, at p. 447.⁶³

1. There is not the slightest question that the House itself, the Select Committee which sat and presented recommendations, the House leadership which urged adoption of those recommendations, and the majority which rejected the recommendations as too lenient, regarded the actions, both proposed and as ultimately adopted, as punishment against the petitioner, Adam Clayton Powell, Jr.

The Chairman of the Select Committee, Mr. Celler of New York, placed in unequivocal terms the understanding of the Select Committee established by the House on January 10, that the objective assigned to them by the House itself was to sit in judgment on Congressman Powell and recommend appropriate punishment. Mr. Celler introduced the Report of the Select Committee in these words:

"Mr. Speaker, the nine men appointed by the Speaker of the House were weighted with the heaviest responsibility that can be placed on any one group—to sit in judgment on their fellow man. What is asked of us when we judge one who had been a colleague for 22 years, who had been sent to Congress time and time and yet time again by his constituency? . . . *That we devise the structure of punishment that will be immediate, effective, certain and lasting.*" Cong. Rec. Mar. 1, H. 1919 (emphasis added).

Lest there be the slightest misconception of the Select

⁶³ See the recent definition of a Bill of Attainder in *U.S. v. O'Brien*, — U.S. — 1968) as a "legislative act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial".

Committee's view of its function, Mr. Celler went on further:

"We had to face up to the necessity of meaningful punishment. The penalties imposed satisfy a stern sense of justice. . . . Exclusion or expulsion seemed deceptively simple." *Yet neither could bring into play the punishments herein devised*, keeping as well the recommendations of this committee within the boundaries of the Constitution and the precedents." Cong. Rec. *supra*, H. 1920 (emphasis added).

The majority leader of the House, Mr. Albert, then reaffirmed the understanding that the entire proceeding was designed and did indeed lead to *punishment* of the Petitioner:

"It is true that what the committee has recommended adds up to stern punishment, But in its wisdom, the committee has decided that this is a just punishment." Cong. Rec. *supra*, H. 1920.

The irrefutable conclusion that was in process was a "legislative act which inflicts punishment without judicial trial," *Cummings v. Missouri, supra*, is revealed in the exchange which then followed between Congressman Lennon and Chairman Celler:

"Mr. Lennon: How can we say in conscience to the people of America, when this distinguished committee finds the gentleman from New York [Mr. Powell], both in his individual capacity as a Member and as chairman of a great committee, has willfully and wrongfully and falsely misappropriated public funds to his own personal use—and the gentleman knows that that is almost identical language that is sent to a grand jury on a bill of indictment for embezzlement. Just how can we vote to do it, my friend, in conscience and morality?"

"Mr. Celler: The report speaks for itself. The report went into all those facts to which the gentleman has adverted, and we came to the conclusion and stated *our findings in the report that we feel the censure and the punishment that we would mete out to Mr. Powell would be ample and sufficient.*" Cong. Rec. *supra*, H. 1921 (emphasis added.)

Representative Moore, the ranking Republican member of the Select Committee, likewise characterized the proceedings as punitive in nature, resulting in severe punishment.

"... we feel we have come to this House with a resolution which *involves, in perhaps its harshest terms, more punishment than has ever been dealt to any single Member of the House of Representatives in the history of our Nation.*" Cong. Rec. *supra*, H. 1921 (emphasis added).

Representative Corman, member of the Committee, described the nature of the Committee's own view of its purpose to assess the proper "legislative punishment" in clear words:

"It was the consensus of your committee that the conduct of Adam Clayton Powell warranted substantially more than censure, although it certainly warranted that too. We felt the punishment should do two things: first, it must be sufficiently severe to stand as a historic warning against future misconduct; second, it ought to retrieve for the American taxpayers, at least in substantial proportions, funds which were misappropriated; and third—and I think of great importance—it ought to leave the door open for redemption." Cong. Rec. *supra*, H. 1925.⁶⁴

⁶⁴ The dissenting views of Congressman Conyers of Michigan, fully recognizing the "punishment" aspect of the procedures and the constitutional consequences which flow from this, are interesting:

Representative McGregor, another member of the Select Committee, likewise stated emphatically his understanding that the proceedings against Mr. Powell were punitive in character for the purpose of devising proper "legislative punishment." *United States v. Brown, supra*:

"Our recommended punishment is unprecedented in its severity. No one in the entire history of the U.S. Senate or House has been punished so harshly as we ask that Mr. Powell be punished. And if Mr. Powell does not appear by March 13 to take his punishment, then under the terms of our recommended resolution his seat will be declared vacant.

"We have recommended the exercise of our punishment power." Congr. Rec. *supra*, H. 1939 (emphasis added.)

The majority of the House, in rejecting the punishment recommended by the Select Committee, did so precisely because they felt that the punishment proposed was not severe enough.

Mr. Curtis, who introduced the amendment which substituted exclusion for the punishment suggested by the Select Committee, made it most explicit that exclusion was punishment for the same offenses and based on the same findings which had been the foundation of the Select Committee's

"However, I cannot allow, in good conscience, of imposing a monetary fine and loss of seniority, be allowed to go unmentioned.

"Because, Mr. Speaker, never before have we had to consider the imposition of a monetary assessment on an individual. Never before has any Member of the Congress been stripped of his seniority in the course of such proceedings.

"The severe punishment of a loss of all seniority and imposition of a \$40,000 fine is, first, violative of our system of Government; second, contrary to constitutional rights of Mr. Powell; third, subjects this matter to appeal in the Federal courts; and is, fourth, totally unprecedented." Cong. Rec. *supra*, H. 1929.

recommendations. This was brought out in response to a question by Mr. Edmondson of Oklahoma:

"Mr. Edmondson: I would like to ask the gentleman if in his view the unanimous Committee findings that are set forth on pages 31 and 32, in which specific findings are made as to the wrongful misappropriation of public funds in amounts in the Committee Report totaling up to over \$46,000—if these findings are in his view a basic and fundamental requirement to the action that is being taken here today?

Mr. Curtis: I wish to thank the distinguished gentleman. Yes, indeed, they are. The basis of the discussion is that this motion of mine is a substitute, but it is based upon—and I emphasize again—the fine work that this Committee did and upon its findings. Incidentally there has been little or no mention about this, but there is also a finding of forgery, which disturbs me very much." Cong. Rec. *supra*, H. 1946.

Mr. O'Neal of Georgia, another supporter of the majority imposition of the severer penalty of exclusion, commented:

"And let us not be confused by arguments that the punishment suggested by the committee is sufficient for his wrongdoings. My background includes 23 years as a prosecuting attorney in the courts of my home State, and such arguments are clearly foreign to my concept of American jurisprudence." Cong. Rec. *supra*, H. 1948.

Still another supporter of the exclusion action, Mr. Dowdy, explained his decision on the basis that exclusion was the only proper penalty for the "criminal conduct" the Petitioner was charged with and had been found "guilty" of:

"Mr. Speaker, I support the resolution that the Member-elect from the 18th District of New York, Adam

Clayton Powell, be excluded from this Congress, and that the seat be declared vacant. I cannot agree with the recommendation of the select committee that he be seated and censured. *If Powell is guilty of the criminal conduct with which he is charged, and I believe he is, and it was so found by the select committee, he ought not to be seated in the U. S. Congress.* If he is not guilty, he would deserve no censure. There is no in between in a case like this. On the proof and debate we have heard here, this resolution to deny the seat demands an 'aye' vote, and I so urge." Cong. Rec. *supra*, H. 1948. (Emphasis added.)

Mr. Broyhill of Virginia spoke in terms which expressed in the frankest way the views of the majority that the action of exclusion was specifically designed to be "legislative punishment."

"Today we are asked to determine what penalty shall be imposed upon one of our own. We have chosen nine of our esteemed colleagues to serve as a select committee to advise us, and they have reported to us.

"The special committee now recommends that we seat Mr. Powell, censure him, strip him of his seniority, and require him to pay \$40,000 through deductions from his congressional salary to offset liability to the U. S. Government.

"Mr. Speaker, if a member of the President's Cabinet were ever to be found guilty of having wrongfully and willfully appropriated some \$44,000 of public funds for his own use, and made false certifications as to expenditures, would the Members of this House allow the President to punish that man by requiring him to pay

back the money misappropriated and by demoting him to a lower Cabinet rank? I think we all know the answer. It is a resounding 'No.'

"If Mr. Powell is guilty of the offenses as our special committee has found, a vote to seat him would be a vote to seat right along beside him every charge of corruption against the Congress of the United States. His guilt, abuses, and illegal actions will taint all of us so long as he remains a Member of Congress. It is inconceivable that we should allow this man to be seated." Cong. Rec. *supra*, H. 1947.

The truly extraordinary nature of the proceedings against the Petitioner was that the entire House, its Select Committee, its leadership and the majority which took control at the conclusion of the debates openly and frankly regarded the proceedings as a means of imposing "legislative punishment—against specifically designated persons." *United States v. Brown*, at p. 447. The only controversy between the majority and the minority was as to the "form or severity" of the "legislative punishment". *United States v. Brown*, at p. 447. The resolution of exclusion for the entire 90th Congress was therefore a classic Bill of Attainder prohibited by the Constitution. *Cummings v. Missouri*, 4 Wall 277; *Ex parte Garland*, 4 Wall 333; *United States v. Lovett*, 328 U.S. 303; *United States v. Brown*, 381 U.S. 450.

2. The constitutional prohibition against a Bill of Attainder has a special and demanding importance in this case. The "reasons for its inclusion in the Constitution, and the evils it was designed to eliminate", *United States v. Brown*, *supra*, at p. 442, are particularly germane to the issues raised in this appeal. In the first place it should be noted in fairness to the petitioner that when the precise questions of alleged misconduct upon which the legislative decree of punishment was avowedly based were presented before a federal grand jury, that body, exercising its judicial func-

tion, declined to return any indictments against petitioner and the Department of Justice announced publicly that there was insufficient evidence to ground a request for indictment. *New York Times*, December, 1968. This recent action merely highlights the evils involved in "legislative punishment" which the Bill of Attainder clause was designed to prohibit. As the Court has only recently reminded us, "The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature" *United States v. Brown, supra*, at p. 442.⁶⁵

One of the central ironies of the District Court's opinion in this case was its insistence that its impotence to grant relief flows from the doctrine of separation of powers. But as this Court has only so recently reminded us:

"The authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, 'in a representative republic * * * where the legislative power is exercised by an assembly * * * which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of

⁶⁵ As the Court points out in *United States v. Brown, supra*, at p. 441, the "history [of the prohibition against Bills of Attainder] . . . provides some guidelines." A Bill of Attainder was not historically limited to sentences of death, but included "bills of pains and penalties" which were "identical to the bill of attainder, except that it prescribed a penalty short of death, e.g., banishment, deprivation of the right to vote or exclusion of the designated party's sons from Parliament." [emphasis added]

United States v. Brown, at pp. 441, 442.

pursuing the objects of its passions * * *, barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments. *The Bill of Attainder Clause was regarded as such a barrier.*" (Emphasis added).

United States v. Brown, at pp. 443, 444.⁶⁶

The doctrine of separation of powers therefore, completely contrary to the District Court's assumption, requires judicial intervention to strike down the action of the House as a "legislative act which inflicts punishment without a judicial trial", *Cummings v. Missouri, supra*. This is because, as the Chief Justice pointed out in *Brown*:

"... the Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons."

United States v. Brown, at p. 445

⁶⁶ The Court in *Brown* calls our attention to the famous discussion of Alexander Hamilton explaining the fundamental policy considerations underlying the Bill of Attainder prohibition:

"Nothing is more common than for a free people, in times of heat and violence, to gratify monetary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense."

United States v. Brown, at p. 444.

For, as the Court concluded:

"By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rulemaking. 'It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.' *Fletcher v. Peck*, 6 Cranch 87, 136, 3 L. Ed. 162."

United States v. Brown, at p. 446.

Consequently, a bill of attainder generates a special and unique demand on the Court—a compulsion more urgent and imperative even than the striking down of an unconstitutional act. The reason is simple: a bill of attainder represents usurpation, by the legislature, of the functions assigned to the judiciary. The integrity of the judicial function itself is transgressed.⁶⁷

⁶⁷ Within the basic scheme of separation of powers, the Bill of Attainder Clause occupies a special place. Article I, Section 9 has been viewed by commentators as a limitation on the Legislative Branch and an affirmation of the judiciary's sphere of supremacy, which is as broad and central to the separation of powers as that created by Article III.

The intensity of the opposition of the Framers of the Constitution to Bills of Attainder has been especially noted by Justice Black:

"Are there circumstances under which Congress could, after nothing more than a legislative bill of attainder, take away a man's life, liberty, or property? Hostility of the Framers toward bills of attainder was so great that they took the unusual step of barring such legislative punishments by the States as well as the Federal Government. They wanted to remove any possibility of such proceedings anywhere in this country. This is not strange in view of the fact that they were much closer than we are to the great Act of Attainder by the Irish Parliament, in 1688, which condemned between two and three thousand men, women and children to exile or death without anything that even resembled a trial. Black, 'The Bill of Rights and the Federal Government' in Cahn, *The Great Rights*, 57 (1963)."

The section of Justice Story's commentary devoted to Article I, Section 9 explains the relationship between the Bill of Attainder prohibition and the separation of powers doctrine.

The edict of permanent exclusion from membership in Congress during the entire 90th Congress was, as we have seen, universally acknowledged by the entire Congress to have been a "legislative act which inflicts punishment"

“§ 1337. The next clause is, 'No bill of attainder' or *ex post facto* law shall be passed.'

“§ 1338. Bills of attainder, as they are technically called, are such special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. But in the sense of the constitution, it seems, that bills of attainder include bills of pains and penalties; for the Supreme Court have said, 'A bill of attainder may affect the life of an individual, or may confiscate his property, or both.' In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions. Such acts have been often resorted to in foreign governments, as a common engine of state; and even in England they have been pushed to the most extravagant extent in bad times, reaching, as well to the absent and the dead, as to the living. Sir Edward Coke, has mentioned it to be among the transcendent powers of parliament, that an act may be passed to attain a man, after he is dead. And the reigning monarch, who was slain at Bosworth, is said to have been attainted by an act of parliament a few months after his death, notwithstanding the absurdity of deeming him at once in possession of the throne and a traitor. The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its order course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent excitements; periods, in which all nations are most liable (as well the free, as the enslaved) to forget their duties, and to trample upon the rights and liberties of others." (III Story, *Commentaries*, 210-11, Chapter 32)

*Cummings v. Missouri, supra.*⁶³ That it was "without a judicial trial" *Cummings v. Missouri, supra*, is not even contested by respondents. See Point I C, *infra*. As Representative Conyers, a member of the Select Committee pointed out:

"As a further illustration that Congress is not the proper body to investigate, judge and impose punishment for violations of law, I would point out that our procedures do not include the usual judicial requirements. Our committee combined within itself the functions of prosecutory, judge, and jury. The committee staff made investigations. The committee passed on motions regarding questions of procedure and law. And the committee issued findings relating to the facts of the case."

(90 Cong. Rec., 1st Sess., H. 1928)

The Select Committee which found the "facts" upon the "legislative punishment" was based justified its denials of the most elemental procedural rights of an accused upon the ruling that "this is not an adversary proceedings" Hearings of Select Committee, *supra*, at p. 59. It needs no citation in this Court to support the threshold proposition of American law that a "judicial trial" requires an adversary hearing. The resolution of exclusion for the entire 90th Congress, universally conceded to be "a legislative act which inflicts punishment", *Cummings v. Missouri, supra*, was adopted as the result of a proceeding universally conceded by the House itself to have been "without a judicial trial." *Cummings v. Missouri, supra*.

This action of the House, a classic Bill of Attainder, which accumulates "all powers, legislative, executive and

⁶³ Cf. *United States v. Lovett, supra*, at p. 316: "Permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."

judiciary, in the same hands—may justly be pronounced the very definition of tyranny” *The Federalist*, No. 67, pp. 373-374. As this Court has so recently held, “by banning bills of attainder, the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making” *United States v. Brown*, *supra*, at p. 446.

In *United States v. Lovett*, *supra*, the Court, again facing a challenge to punitive action directed against named individuals, reminded us that “when our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder.” *Supra*, at p. 318. Once again, in the words of Mr. Justice Black in *Lovett*, this Court has no alternative but to say that as “much as we regret to declare” that action of Congress “violates the Constitution, we have no alternative here” *Lovett*, *supra*, at 318.⁶⁰

C. The punishment of exclusion from Membership in the House inflicted upon the Petitioner violated the Due Process Guarantee of the Fifth Amendment.

The action of the House in excluding the Congressman-Elect on the four stated grounds in H. Res. 278, see Statement of Facts, *supra*, for the avowed purpose of punishing him for these alleged findings of misconduct, see Point I, B, *supra*, was in violation of the Due Process Guarantee of the Fifth Amendment to the Constitution of the United States. It was not an action “based upon reasonable consideration of pertinent matters of fact according to estab-

⁶⁰ The precise form of legislative action, bill, Act, or Resolution has no relation to the prohibition against Bills of Attainder. “. . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution”, *United States v. Lovett*, *supra*, at p. 315.

lished principles of law" *Newberry v. United States*, 256 U.S. at 285. It was "an arbitrary edict of exclusion." *Newberry v. United States*, *supra*, at p. 285.

We have demonstrated that this "arbitrary edict of exclusion", designed to punish the named individual, is in sharp violation of the constitutional prohibition against Bills of Attainder. See Point I, B, *supra*. But even if the action is sought to be justified under the powers of the House pursuant to Article I, § 5, this power to "judge" must itself be measured by the commands of the Due Process Clause. This Court has clearly so-held.

In the famous concurring opinion of Mr. Justices Pitney, Brandeis and Clarke, in *Newberry v. United States*, *supra*, at p. 285, adopted approvingly by the Court in *United States v. Classic*, 313 U.S. 299, this is made amply clear:

"The power to judge of the elections and qualifications of its members, inhering in each House by virtue of Sec. 5 of Art. I, is an important power, essential to our system to the proper organization of an elective body of representatives. But it is a power to judge, to determine upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass on arbitrary act of exclusion" at p. 285.⁷⁰ (emphasis added)

There can be no argument, as we have demonstrated previously, see Point I, B, *supra*, that the act of exclusion was

⁷⁰ See, for example, *United States v. Ballin*, 144 U.S. 1, "The Constitution empowers each house to determine its own rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relationship between the mode or method of proceeding established by the rule and the result which is sought to be obtained" at p. 5. See, also, *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372 (1816): "The article [Due Process Clause of Fifth Amendment] is a restraint on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

conceived of by the entire House as the imposition of *punishment* upon the Member-Elect.⁷¹ If there is one principle which has "remained relatively immutable in our jurisprudence", *Greene v. McElroy*, 360 U.S. 474, 496, it is that punishment may not be meted out to American citizens without adherence to the minimal protections of due process of law required in an adversary proceeding. This is a first concept of our American law and is applicable to any form of governmental action, whether criminal or civil, executive, legislative or administrative, which results in punishing a citizen. See for example, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123; *Shaughnessy v. United States ex rel. Meti*, 345 U.S. 206; *Greene v. McElroy*, *supra*.⁷²

⁷¹ Mr. Celler himself, the Chairman of the Select Committee, characterized the task of the Committee as including the responsibility that "we devise the structure of punishment that will be immediate, effective, certain, and lasting." Cong. Rec. March 1, 1967, H. 1919. He added, "We had to face up to the necessity of meaningful punishment", *id.* at H. 1920. Mr. Moore, the ranking Republican member of the Committee, said that the Committee has "come to this House with a resolution which involved in perhaps its harshest terms, more punishment than has ever been dealt to any single Member of the House of Representatives in 'the history of our Nation'", *id.* at H. 1921. Those members who rejected the recommendations of the Select Committee, did so because they felt the *punishment* recommended was not severe enough. See, for example, Mr. O'Neil of Georgia: "And let us not be confused by arguments that the punishment suggested by the Committee is sufficient for his wrongdoing", *id.* at H. 1948. See also, for example, similar statements at H. 1946, H. 1948 and H. 1949.

⁷² As Chief Justice Warren has stated in *Greene v. McElroy*, 360 U.S. 474, 496-97 (1919): "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be

The extraordinary nature of the proceedings in the House⁷³ which resulted in findings of fact upon which the House admittedly took punitive action against the Member-Elect was that when the Member-Elect moved for certain elementary rights of due process of law at the outset of the hearings of the Select-Committee, these were denied. The Member-Elect had requested these rights including, but not limited to, the following:

"(1) Fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by an accuser;

(2) the right to confront his accusers and in particular to attend in person and by counsel, all sessions of this Committee at which testimony or evidence is

confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g., *Mattox v. United States*, 156 U.S. 237, 242-244, 39 L. ed. 409-411, 15 S. Ct. 337; *Kirby v. United States*, 174 U.S. 47, 43 L. ed. 890, 19 S. Ct. 174; *Motes v. United States*, 178 U.S. 458, 474, 44 L. ed. 1150, 1156, 20 S. Ct. 993; *Re Oliver*, 333 U.S. 257, 273, 92 L. ed. 682, 694, 68 S. Ct. 499, but also in all types of cases where administrative and regulatory actions were under scrutiny. E.g., *Southern R. Co. v. Virginia*, 290 U.S. 190, 78 L. ed. 260, 54 S. Ct. 148; *Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U.S. 292, 91 L. ed. 1093, 57 S. Ct. 724; *Morgan v. United States*, 304 U.S. 1, 19, 82 L. ed. 1129, 1133, 58 S. Ct. 773, 999; *Carter v. Kubler*, 320 U.S. 243, 88 L. ed. 26, 64 S. Ct. 1; *Reilly v. Pinkus*, 338 U.S. 269, 94 L. ed. 63, 70 S. Ct. 110.

⁷³ Until this unusual proceeding the House itself has always afforded a Member due process of law when possible punishment is involved. For example in the First Congress, during the contested election case of *Ramsay v. Smith*, 1 Hinds 717, the reports state: "Mr. Smith be permitted to be present from time to time when proofs are taken, to examine the witnesses and to offer counter-proofs—", 1 Hinds 717. See for example Statement of Congressman Robeson in the 47th Congress (1882) in discussing procedures to be followed in an exclusion case: "We are a court, then, of high equity, proceeding according to legal processes to investigate truths, the conditions of which are defined and fixed by constitutional law." Cf. also the full procedural guarantees afforded in every respect to the Mississippi Members challenged in the *Mississippi Contested Elections of 1965*.

taken and to participate therein with full rights of cross-examination;

(3) the right to an open and public hearing;

(4) the right to have this Committee issue its process to summon witnesses whom he may use in his defense;

(5) the right to a transcript of every hearing."⁷⁴

The principal requests of the petitioner for the elementary rights of due process of law required when adjudication will result in punishment, see *Greene v. McIlroy, supra*, were denied by the Committee upon the rather astounding ground that "This is not an adversary hearing," *Hearings of Select Committee, supra*, at p. 59. To make it amply clear why these elementary procedural rights of notice, statement of charges, confrontation and cross-examination were being denied, the Chairman concluded his ruling by stating: "Again the Committee states that this is an inquiry and not an adversary proceeding." *Hearings of Select Committee, supra*, at p. 59.⁷⁵

The truly extraordinary nature of these rulings denying the petitioner the most elementary rights of due process of law, based on the theory that the proceeding which ultimately resulted in punishment was not "adversary" in nature but merely an "inquiry", is underscored by the procedures followed contemporaneously by the other

⁷⁴ See motion filed by counsel for petitioner before Select Committee, *Hearings of Select Committee*, p. 54.

⁷⁵ It should be noted that in its final report Honorable John Conyers, Jr., Member from Michigan and a member of the Select Committee, dissented from this ruling, stating, in part:

"A. Any Member or Member-elect and his counsel should be afforded the right to cross-examine all witnesses brought before this committee or any other committee inquiring into the qualifications, punishment, final right of a Member to be seated, or other related questions." (Emphasis added.)

Report of Select Committee, *supra*, at p. 35.

House in the hearings involving Senator Dodd. At the outset of the Dodd hearings the Chairman stated:

"Senator Dodd will have all his rights protected at this hearing. He may attend the hearings and may testify if he wishes. He may be accompanied by counsel of his own choosing. He or his counsel will be permitted to cross-examine witnesses and offer evidence in his own behalf.

"Gentlemen, Rule 13 of our Rules of Procedure limits the right of a person who is the subject of an investigation to submit to the Chairman and to the Committee questions for cross-examination. That rule is rather narrow and restricted. I said at the time of our adoption of the rules that if any staff member or any Senator was before us on investigation, that it would be unthinkable to me to give them less than the basic principles of American justice and procedure, that is for the right to cross-examine all witnesses. That is what we have arranged for here when this matter was voted, to have a hearing with reference to Senator Dodd. I have been on another committee that had hearings concerning a Senator, the late Joe McCarthy, and we, of course, extended the same rule there. Anything less than that would be less than American standards of justice."⁷⁶

The shocking contrast between the procedural rights granted to Senator Dodd at the hearings which resulted in a recommendation of the mildest form of punishment, censure, and the denial of these rights to this petitioner at hearings which resulted in what the House itself conceived of as the severest form of punishment, exclusion from the House, is best evidenced by the Select Committee of the

⁷⁶ See report of Hearing of Senate Ethics Committee.

Senate's own description of the conduct of the Dodd hearings and the rights afforded Senator Dodd and his counsel:

"Rights and Privileges

Subject of hearing

Senator Dodd, as the subject of the Investigation, was afforded the opportunity to attend all hearings and to be accompanied and represented by counsel. *He was given notice of the charges to be investigated and given time to prepare for hearings. He was also given the names of witnesses and a summary of their expected testimony prior to hearings. He and his counsel were permitted to cross-examine witnesses called by the Committee, and to call and examine additional witnesses and to present additional evidence. The Committee did not call Senator Dodd as a witness, respecting his right to remain silent. He was, however, offered the opportunity to testify and did, in fact, take the stand. At his request, Senator Dodd was examined by Members of the Committee, rather than by Committee counsel. In addition, Senator Dodd was given opportunity to raise, and be heard on, procedural and jurisdictional questions prior to and during hearings and to object and present argument on the admissibility of evidence."* (Emphasis added.)

Report of the Select Committee on Standards and Conduct of the United States Senate on the Investigation of Senator Thomas J. Dodd of Connecticut. Rep. #193, 90th Congr., 1st Sess., p. 13.⁷⁷

⁷⁷ In addition the Senate Committee described the rules of evidence it followed in this fashion:

"In general the Committee was guided by the rules of evidence applicable to the Federal courts. All testimony from witnesses was taken under oath and by personal appearance. Hearsay evidence

Representative-Elect Powell, facing a hearing which resulted in findings of fact upon which the severest of all punishment was inflicted upon him, in contrast to the Senate Committee's own description of its own proceedings, was (1) given no notice of the charges to be investigated except in such terms as "alleged misconduct on your part occurring at any time since January 3, 1961."⁷⁸ (2) he was not "given the names of witnesses and a summary of their expected testimony prior to hearings"; (3) Neither he nor his counsel "were permitted to cross-examine witnesses called by the Committee";⁷⁹ (4) The Committee did not "respect his right to remain silent" although he did testify freely and voluntarily as to the only relevant matters before the Committee, his constitutional qualifications for membership in the House, but the Committee drew adverse inferences from his exercise of his right to remain silent as to matters relating to possible punishment;⁸⁰

The Committee did not permit counsel for the Congressman-elect to be "heard" on procedural and jurisdictional questions and to "object and present argument on the admissibility of evidence";⁸¹ and finally, the Committee was in no way "guided by the rules of evidence applicable to the Federal courts," and hearsay evidence rather than "limited" was extensive.

The words of the Honorable Chairman of the Senate Se-

was limited and assigned appropriate probative value. Affidavits in lieu of personal appearance by witnesses were admitted only on restricted matters or where the calling of witnesses was impractical or impossible. All documents and records were properly authenticated before being accepted by the Committee." Report of Senate Select Committee, *supra*, at p. 11.

⁷⁸ Cf. for example: *Watkins v. United States*, 354 U.S. 178 (1957).

⁷⁹ Cf. for example: *Pointer v. Texas*, 380 U.S. 400 (1965).

⁸⁰ Cf. for example: *Slochower v. Board of Education*, 350 U.S. 551 (1956).

⁸¹ It hardly needs citation to support the proposition that the right to "effective counsel", see *Powell v. Alabama*, 287 U.S. 45, includes the right of counsel to be heard before the Court.

lect Committee investigating Senator Dodd are particularly appropriate in evaluating the nature of the proceedings in the House upon which the most serious of punishments was inflicted upon the Congressman-Elect:

"I said at the time of our adoption of our rules that if any Staff member or any Senator was before us on investigation, that it would be unthinkable to me to give them less than the basic principles of American justice and procedure. . . . Anything less than that would be less than American standards of justice."⁸²

The procedures followed by the House in adjudicating the four findings of fact upon which the punishment of exclusion rested was, in the words of Senator Stennis referred to above, "less than the basic principles of American justice and procedure . . . less than American standards of justice." Cf. *Palko v. Connecticut*, 302 U.S. 319; *Gideon v. Wainwright*, 372 U.S. 335. Accordingly, the punishment of exclusion ordered by the majority of the House violated the guarantee of due process of law contained in the Fifth Amendment of the Constitution of the United States. It was not an action "based upon reasonable consideration of fact according to established principles of law." *Newberry v. United States*, *supra*.

D. *The Exclusion of the Petitioner violated his rights and the rights of the overwhelming Negro majority of the citizens of the 18th Congressional District guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.*

The uncontested circumstances surrounding the refusal of the majority of the House to seat the Petitioner, the duly elected and constitutionally qualified choice of the people of the 18th Congressional District of New York, as their repre-

⁸² See report of Hearing of Senate Ethics Committee.

sentative reveals a serious question as to whether the Petitioner's rights as a Negro citizen, and the rights of the approximately 400,000 Negro citizens residing in the 18th Congressional District of New York to the freedom and equality guaranteed to them by the Wartime Amendments have been violated.

It is of course unnecessary to demonstrate by affirmative evidence subjective intent of the House that the act of exclusion was related to considerations of race prohibited by the Wartime Amendments. It has long been established that disparity of results or treatment may be sufficient to demonstrate constitutionally impermissible discrimination by reason of race even where the treatment on its face involves no overt racial classifications or stated motivations. See *Gomillion v. Lightfoot*, 364 U.S. 339; *Strauder v. State of West Virginia*, 100 U.S. 303; *Neal v. State of Delaware*, 103 U.S. 370; *Gibson v. State of Mississippi*, 162 U.S. 565; *Carter v. State of Texas*, 177 U.S. 442; *Rogers v. State of Alabama*, 192 U.S. 226; *Martin v. State of Texas*, 200 U.S. 316; *Norris v. State of Alabama*, 294 U.S. 587; *Hale v. Commonwealth of Kentucky*, 303 U.S. 613; *Pierre v. State of Louisiana*, 306 U.S. 354; *Smith v. State of Texas*, 311 U.S. 128; *Hill v. State of Texas*, 316 U.S. 400; *Akins v. State of Texas*, 325 U.S. 398; *Patton v. State of Mississippi*, 332 U.S. 463; *Cassell v. State of Texas*, 339 U.S. 282; *Hernandez v. State of Texas*, 347 U.S. 475; *Reece v. State of Georgia*, 350 U.S. 85.

We would respectfully call to the Court's attention the following uncontested circumstances which we suggest lead to the inevitable conclusion that the punitive exclusion of the duly elected and constitutionally qualified representative of the overwhelmingly Negro constituency of the 18th Congressional District of New York was at least in substantial part based upon reasons of race, in violation of the Constitution.

a) In the entire history of the Nation with the exception of

a tiny handful of episodes characterized by Chairman Celler as "bespeaking furor instead of fairness" (Congr. Rec. March 1, 1967, H. 1945), in the countless cases brought before the House, Congressman Powell, a Negro citizen, representing a predominantly Negro constituency, was the only Member ever excluded on grounds which, in the opinion of the select Committee of the House, the Majority Leader of the House and the Chairman of its own Judiciary Committee, wholly disregarded the constitutional limits of the House's power.⁸³

b) In full recognition that the Congressman-Elect had been overwhelmingly chosen by the predominantly Negro electorate of his district with full knowledge on their part of the alleged acts of misconduct upon which the punishment of exclusion was based, the majority of the House nevertheless further ordered that the Congressman-Elect be permanently barred from the 90th Congress. In face of the universal recognition both within the Congress and in the Nation at large that the citizens of the 18th Congressional District would overwhelmingly return the Petitioner in any new election⁸⁴ this action of the House permanently barring the Petitioner from the 90th Congress could only have the objective and result of depriving the predominantly Negro citizens of the 18th Congressional District of the rights guaranteed to them by the Wartime Amendments to an equal participation in the "political community of the United States." Cf. *Civil Rights Cases*, 109 U.S. 3 (1883).

A clearly possible inference which under such circumstances could be drawn by the Negro constituents of the 18th Congressional District was that only a representative ac-

⁸³ See Point I (vi), *supra*.

⁸⁴ See for example:

The World Journal Tribune, editorial: "The Ouster of Powell," March 2, 1967; *New York Post*, "Harlem Vows to Vote Him Back", March 2, 1967; *World Journal Tribune*, "The Nomination is Powell's," and "Shock, Angry Threats in Harlem," March 2, 1967.

ceptable to the all-white majority of the House, who had overridden the sober advice of their own leadership, could be chosen by them. That in fact this was the inference drawn by almost the entire Negro community, not only the 18th Congressional District, but of the Nation, must give serious pause to this Court.⁸⁵

Where the singling out of Negro citizens for separate and special treatment occurs, this Court has recognized time and again that this creates and furthers a sense of inferiority in the black man—the original cornerstone of the institution of slavery, see *Dred Scott v. Sanford*, 19 How. 393, a sense of inferiority which is at the heart of the badges and indicia of slavery this Nation solemnly promised to eliminate forever in the Wartime Amendments. See *Bell v. Maryland*, 378 U.S. 226, concurring opinion of Mr. Justice Douglas at

⁸⁵ See for example an article appearing in the *New York Post* on March 2, 1967, in which Negro leaders expressed their sentiments that the House action denied the people of the 18th Congressional District their basic right to choose their own representatives. "Whitney M. Young, Jr., National Director of the Urban League, called the action against Powell 'shocking' and said that it 'denies the basic right of constituents to representation of their own choosing. Floyd McKissock, National Director of CORE, said the expulsion of Powell is a 'slap in the face to every black man in this country.' They said the issue 'goes much further and deeper than Adam Clayton Powell the man and the representative. The issue goes to the subject of representative government which black people in Harlem have been denied.'" And in an article appearing in the *Afro-American* of April 29, 1967, Roy Wilkins, Executive Director of the NAACP, said, "Since there was no code which Powell could have violated the sentiment to deny him his chairmanship, to seat him but with a humiliating, unprecedented public and oral censure, and in a final spiteful upset, to expel him from his seat altogether, had to proceed not from a finding rooted in known and commonly applicable rules, but from each Congressman's personal standards, biases and political inclinations. These, of course, are not proper bases for dispensing American justice as derived from Anglo-Saxon precedents. We presume a defendant innocent until a trial has found him guilty. We have laws. We have courts with rules of procedure. We go to extreme lengths to try to prevent personal bias and other irrelevant persuasions from influencing a verdict. Yet, no code of ethics against which a line of conduct might have been measured, the House summarily convicted and punished Powell. At the time one thought Adam's remark about 'lynching' an extreme but understandable reaction."

p. 242, *Jones v. Alfred H. Mayer Co.* 392 U.S. 409 (1968), See Kinoy, "The Constitutional Right of Negro Freedom, 21 Rutgers Law R. 387 (1967)."

c) The effect of instilling and generating a sense of inferiority in the Negro citizens of the 18th Congressional District, proud of their achievements over the years in having been the first Congressional District composed predominantly of Negro citizens, to have the political ability and organization to elect a Congressman with twenty-two years of seniority,⁸⁶ able to wield enormous power in the legislative process⁸⁷ was enormously accentuated by the striking

⁸⁶ See for example:

The following statements which appeared in the *Amsterdam News*, a leading Negro newspaper on March 4, 1967: Isaiah Brown, a constituent of Congressman-Elect Powell stated, "I think Powell should be seated without losing his seniority. That's a foul play if there ever was one. We lose a Congressman or we lose his courage. I can't help but feel that race is involved." Mrs. Ernesta Proppe, "It is unfortunate that Adam Powell had to be the scapegoat, and more unfortunate that there was not a code of ethics set forth for everyone in Congress, not only to apply to Adam Powell but everyone as well. As far as I am concerned, he is still the brightest star in the House of Representatives"; Mrs. Mary Eddie, "I believe Adam Clayton Powell should be reinstated to his full position. We cannot afford to lose a Congressman. The Negro needs more representation"; Mike Lopez, "If Powell leaves his position the people who elected him and the Harlem community will be deprived of a great fighter." And in an article in the *New York Times* for January 3, 1967, Rev. Benjamin F. Payton, Executive Director of the Commission on Race and Religion of the National Council of Churches, in announcing the endorsement of Mr. Powell by the Baptist Ministers Conference of Greater New York, said, "We ask the people of the United States not to take away the one great symbol of power that Negroes have developed so painfully over the years."

⁸⁷ The significance and importance of seniority in the legislative process in this country is acknowledged by all serious students of our political processes. See for example George B. Galloway, Senior Specialist, Legislative Reference Service of Congress, *The Legislative Process in Congress* (1953), Legislation is, unquestionably much influenced by the men who have scored long and occupy those important places in the House. Seniority or length of service in the House of Representatives is a large factor in giving a member position and influence in the Congress and in Washington." See also George, *The Seniority System in Congress*, 53 Am. Pol. Sc. Rev. 413. "Its significance for constituencies was expressed by Senator Byrd who explained that 'seniority of service and committee rank have

disparity in both the procedural treatment and punishment assigned to Congressman-Elect Powell, a Negro citizen, and Senator Dodd, a white citizen. We have discussed in some detail in Point I, B, *supra*, the extraordinary differences in both the procedural protections afforded Congressman Powell and Senator Dodd, and the actual punishments recommended. Disparity in punishment, as this Court has so often pointed out, has been one of the most striking remnants of the slave system. See Mr. Justice Bradley's discussion in the majority opinion in the *Civil Rights Cases*, 109 U.S. 3. Even the form of "censure" recommended in Congressman Powell's case, the humiliation of being arrested by the Sergeant-at-Arms and escorted to the well of the House to be publicly rebuked by the Speaker, see Report of Select Committee, contrasted to the mild form of rebuke proposed by the Senate for Senator Dodd, accentuates inevitably the "badge of inferiority" which this Nation has pledged itself to eliminate forever from its life. How much more sharply is the inevitable inference of inferiority drawn when the drastic and unconstitutional punishment of exclusion is applied to the one Negro Congressman who has become, whether or not portions of the white community agree, a symbol of effective and powerful Negro participation in the political life of the Nation, while the punishment suggested for the white Senator is of the mildest nature? ⁸⁸ This

importance over and above the capabilities of the members'". See *See* Clapp, *The Congressman* (Brookings Institute); Froman, *Congressmen and their Conscience* (1963).

⁸⁸ The Negro community cannot avoid making the bitterly obvious comparison between the treatment of Dodd and Powell. See for example the editorial comment which appeared in the *Afro-American* of April 15, 1967: "For Sen. Dodd, who is white, the punishment is a verbal 'naughty, naughty'. For Mr. Powell, who is not white, a brutal boot out of the door. If this is even-handed justice, we have been reading the wrong books."

Roy Wilkins, Executive Director of the NAACP, made the following statement in the *Afro-American* of April 29, 1967:

"Inevitably, comparison with the unhappy experience of Senator Thomas Dodd, of Connecticut, will be made. Senator Dodd, unlike Rep. Powell,

Court in *Brown v. Board of Education*, 347 U.S. 483 taught that separate treatment of Negro children instilled in them inevitably a sense of inferiority and frustration. We ask the Court to consider how much more serious is the sense of inferiority and frustration instilled in the Negro citizens of the 18th Congressional District, America's largest black urban ghetto area, as well as in Negro citizens throughout the Nation, when they see what all thinking citizens understand to be the extraordinary disparity between the treatment of the Negro Congressman in the House and the white Senator in the Senate.⁸⁹

had notice of nearly a year that he was to be investigated. All during that period and the time of the hearing, the Senator enjoyed his full privileges, retained control of his office and employees, served on his committees and enjoyed all the prerequisites of office. Even now, in the face of such defense as he was able to muster, he goes about his business as a United States senator. Some of the amounts mentioned in the Dodd hearing make the alleged airline ticket errors of the Powell office look like the apple-snatching of a small boy. Misuse of funds, of course, is misuse, whether the amount is \$15,000 or \$150; the point is that one man went through orderly procedure and the other faced a chopping block.

⁸⁹ As we have indicated, we bear no burden here, under the decisions of the Court, to prove subjective racial motivation, underlying the act of exclusion. We feel, however, that it is our responsibility to bring to the attention of this Court the remarks of Mr. Holland, of Pennsylvania, during the March 1st debate, which express at least his opinion that issues of racial discrimination entered openly into the action of the majority of the House in overriding their own Select Committee's recommendation that the Congressman-Elect be seated.

"MR. HOLLAND, of Pennsylvania: But not even all those who voted to repudiate the committee they had established were guilty of 'racism, pure and simple'. There is little that is pure, and less that is simple about this entire situation.

"Neither can I agree with those who have asserted that the question of racism does not enter into the Powell case. We have been told that 'if the gentleman from New York were white, he would have been punished long since.' IS ADAM CLAYTON POWELL the only sinner in the House? Does this House have such a long and complex list of precedents of censuring and demoting and fining Members who do not meet its high moral standards? I can think of a few cases in recent years where Members of this House were guilty of far greater moral and even criminal offenses than the gentleman from New York

(Footnote continued on next page)

(Footnote continued from preceding page)

is even charged with, and yet I cannot remember that the House took action. We left punishment for these offenses to the voters of these Members' districts.

"There is some reason, surely, that the Powell case, alone has given rise to such drastic punishment. I find it impossible to shake the conviction that a large part of the intense public campaign against Mr. POWELL stems from the fact of his race. Some of this stems directly from the view entertained in many quarters of this country that the Negro enjoys the rights of full citizenship only on a tentative basis—that if a Negro offends community sensibilities in any way, he and all other Negroes should be made to suffer for it, while white men who commit the same sins are judged by a different, more lenient standard, and their punishment is not visited upon the white community as a whole.

"ADAM POWELL, is being judged, not for his sins alone. He is being punished for the statements of Stokely Carmichael and the bad poetry of Cassius Clay and the sins of every other Negro in the country, just exactly as every law-abiding decent Negro citizen finds the pattern of discrimination against him 'justified' by the argument that some Negroes break the law. This concept of joint responsibility for each other's shortcomings is a handicap that white Americans would have risen up in arms against had it been visited upon every minority group in this country.

"No, Mr. Speaker, I cannot accept the notion that ADAM POWELL is being punished by colorblind justice. I, too, have read the mail that has been cited as 'evidence of deep public concern.' Let me quote some of the mail that I received for the RECORD.

Shame on you and Congressman ———.

You are both nigger lovers. We will remember you at the polls next election.

"That postcard was, of course, anonymous. I received, naturally some letters opposed to Mr. POWELL which avoided using racial slurs, and a few which did not even seem to be motivated by racial ill will. But the mail I have received on this subject left no doubt in my mind that it was largely motivated by the notion that a Negro Congressman ought to be more circumspect, more humble, and more 'grateful' than his white colleagues need to be. I submit, Mr. Speaker, that whatever may be the motives of individual Members in this case, the effort to exclude the gentleman from New York could not have succeeded, and might not even have been attempted, had ADAM C. POWELL done everything he is accused of doing, but had he been—to coin a phrase—'less colorful'. And I think, Mr. Speaker, that we all know that to be true.

"And I believe, too, Mr. Speaker, that there would not have been the intense newspaper and other public pressure—which dates back to the very day Mr. POWELL assumed the chairmanship of the Education and Labor Committee—had he not been so vigorous and so

We are fully conscious of the serious nature of charges that the drastic punishment of exclusion flowed at least in part from considerations of racial prejudice prohibited by the 13th, 14th and 15th Amendments to the Constitution. Only recently the Nation has been seriously warned of the corrosive and dangerous impact of racist thinking and practices on every aspect of American life. See the Report of the National Advisory Commission on Civil Disorders, p. 91 (1968). It is out of this concern that we deem it our responsibility to call to the Court's attention the startling fact that the charges in petitioner's complaint that his exclusion from the House of Representatives was grounded at least in part in racial considerations banned by the Wartime Amendments has been substantially acknowledged by the Chairman of the Select Committee of the House itself, the Honorable Emmanuel Celler, Chairman of the Judiciary Committee of the House. In an interview on national television on May 15, 1967, shortly after the filing of the first petition for writ of certiorari prior to judgment in the Court of Appeals, Congressman Celler, who chaired the committee which conducted the proceedings against petitioner in the House made the following statements in response to questioning:

MILTON BERGERMAN: "Congressman, the introduction

successful a fighter for long-needed economic, social, educational and labor legislation. This, too, while select committee's report and while never mentioned in the editorials that demand ADAM CLAYTON POWELL's scalp—this, too, I say, is part of the 'case against' ADAM CLAYTON POWELL.

"And so, Mr. Speaker, I intend to vote against the amendment of the gentleman from Missouri, and, if it passes, against the resolution as amended. I cannot vote to deny the people of the 18th District of New York their representation among us. I suspect that these people, who have borne generations of injustice with an undiminished optimism about democracy that shames their more fortunate fellow citizens, will not learn from this episode to 'elect someone who is willing to shuffle a little'."

90th Congress, Congressional Record, H1960 March 1, 1967.

indicated that Adam Clayton Powell's brief in the Supreme Court yesterday charging that his exclusion was based on racism and charging that his punishment was to be contrasted with the mild rebuke which Senator Dodd got, or was recommended to get. You think that that position on his part is sound?"

CELLER: "Well, with reference to racism, I believe there was an element of racism in the vote in the House that rejected the resolution which I as Chairman of the Select Committee offered. It was racism accompanied by the hysteria that had resulted from the climate of public opinion due to Mr. Powell's antics and peculiarities and swagger and defiance.

The Congressman then further stated:

It's difficult to say whether or not if resolution of the type I offered before would be offered again, whether the House would accept it or repeat its action that it had made in the first instance. We're counting noses and we don't seem to find at this juncture much change of opinion with reference to the attitude of the members towards Mr. Powell. And I fear me that if the resolution, mild as I thought mine was, is again offered, it may meet the same fate and be defeated and another resolution might be offered again to oust him and I do not believe that is—I should say it's illegal to and is contrary to what I feel is reasonable and proper to oust a man. Because how can you oust—eject a man from the House before he is a member? And, my theory is that he has to be—has to receive the oath to become a member before he can be ejected from the House."

BERGERMAN: "Well, that's on the second one. That's on the current one."

CELLER: "Yes, well, I fear me that the House will

take the bit in its teeth again and for the same reasons that actuated them before racism, hysteria, and so forth and fear, because there's an avalanche of mail received by the Congressman which is all hostile to Powell, I fear me that the House will do the—respect its error again, unfortunately, and I feel that is wrong."

And finally the Congressman stated:

LYNN: "Congressman, the House leadership, including yourself as you mentioned, opposed this severe penalty for Mr. Powell, of exclusion."

CELLER: "The House leadership supported my resolution."

LYNN: "That's right. Now . . ."

CELLER: "And deplored and opposed his—his eviction, you might put it that way."

LYNN: "Now isn't the leadership doing anything to end its racism and hysteria which you called that will lead to a repetition of this exclusion?"

CELLER: "The leadership is doing all and sundry in that regard, but that racism is pretty deep. It's wide and deep. Members from the South have the strongest kinds of convictions on this matter."

See transcript of "Searchlight," WNBC-TV, Sunday, May 14, 1967. Attached as Appendix A to Emergency Supplement to Petition for Writ of Certiorari prior to judgment.

We respectfully suggest that in light of these frank concessions by Congressman Celler, the Chairman of the Select Committee, and one of the respondents in this action, it is impossible to dismiss the allegations in the complaint of racial motivation in the exclusion of petitioner as "so purely

conclusory in character as under elemental pleading concepts, not to require a hearing on the merits," see concurring opinion of Circuit Judge McGowan below, 395 F.2d at 606. Two of the three Court of Appeals judges acknowledged that at a minimum racial considerations in the exclusion of a duly elected member of the House would call for judicial relief. See opinion of Circuit Judge McGowan, 395 F.2d at 606 and opinion of Circuit Judge Leventhal, 395 F.2d at 608.

After Congressman Celler's public concessions of the seriousness and validity of petitioner's charges that racist considerations violative of the most fundamental prohibitions of the Wartime Amendments were present in the unprecedented act of exclusion of a duly qualified and elected Negro representative we cannot understand how respondents can continue to argue that this is a controversy which the judicial power cannot reach. If there is one question which we would have thought wholly settled in this Court it is that the judicial power of the United States is always available to remedy discrimination by any branch of the government, state or federal against citizens by reason of their race. *Brown v. Board of Education*, 347 U.S. 483; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409. On the record now before the Court and on the basis of the public concessions of respondent Congressman Celler the Court should reverse the judgment of dismissal below and order an appropriate relief. No governmental body, or office, state or federal, in this country, no matter how august or high placed is exempt from the commands of the Thirteenth, Fourteenth and Fifteenth Amendments.

POINT TWO

The dismissal of the complaint by the District Court for want of jurisdiction of the subject matter totally disregarded the most historic opinions of this Court. The Court had jurisdiction over the subject order and the cause was justiciable.

- A. *The dismissal of the complaint for "want of jurisdiction of the subject matter" was in violation of Article III of the Constitution and the most authoritative decisions of this Court.*

Once again, as in *Baker v. Carr*, 369 U.S. 186, the District Court's "opinion reveals that the court rested its dismissal upon lack of subject-matter jurisdiction and lack of a justiciable cause of action without attempting to distinguish between these grounds." *Baker v. Carr*, at p. 196.⁹⁰ As in *Baker v. Carr*, the District Court below "was uncertain as to whether our cases withholding judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject-matter for judicial consideration—what we have designated 'non-justiciability.'" *Baker v. Carr*, at p. 198. As in *Baker v. Carr*, here also "*the distinction between the two grounds is significant*," *supra*, at p. 198.

As this Court pointed out in *Baker*, "in the instance of non-justiciability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Con-

⁹⁰ All three opinions in the Court of Appeals acknowledge the erroneous nature of the conclusion of the District Court that the complaint must be dismissed for want of federal subject matter jurisdiction. However, since respondents would seem to continue to urge a want of "jurisdiction" upon the Court we proceed to analyze briefly the fundamental error in this position.

stitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, Sect. 2), or is not a 'case or controversy' within the meaning of that section; or the cause is not described in the jurisdictional statute" *Baker*, at p. 198. (Emphasis added).

Nothing could be plainer than that the matter in this complaint arises under the Constitution of the United States and that the conclusion of the District Court that the complaint must be dismissed "for want of jurisdiction over the subject-matter" was wholly erroneous.

As this Court reminded the District Court in *Baker*, "Article III of the Federal Constitution provides that 'The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority. . . .'" And, as in *Baker*, it is obviously "clear that the cause is one which 'arises under' the Federal Constitution," *supra*, at 199. For, as in *Baker*, "dismissal of the complaint upon the ground of lack of jurisdiction of the subject-matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit' *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579, or 'frivolous,' *Bell v. Hood*, 327 U.S. 678, 683."⁹¹ That the claim is insubstantial must be 'very plain.' *Hatt v. Keith Vaudeville Exchange*, 262 U.S. 271, 274" *Baker*, at p. 199.

Here, all parties agree that the constitutional questions raised by the complaint are serious and substantial. The District Court, for example, holds that Petitioner's argument that the constitutional power to judge the "qualifications" of its members is limited to those qualifications stated in the Constitution, "can be argued with force and conviction." The respondents stated in their memorandum to the

⁹¹ It is interesting that the Court in *Baker* commented, in Footnote 17 that "the accuracy of calling even such dismissals 'jurisdictional' was questioned in *Bell v. Hood*. See 327 U.S. at 683", *Baker, supra*, at p. 199.

Court of Appeals opposing the motion for summary reversal, that "this case presents fundamental constitutional questions," Memorandum, p. 82; that "this case poses questions of transcendent constitutional importance," Memorandum, p. 3; that the constitutional issues "posed on the merits" are "novel and important," Memorandum, p. 3. In short, the respondents concluded in their memorandum to the Court of Appeals that the issues raised in this case are of "fundamental constitutional significance," Memorandum, p. 15. The consequences which flow from the conclusions of both the District Court and the respondents are perfectly clear. As this Court said in *Baker*, "Since the District Court obviously and correctly did not deem the asserted federal constitutional claim unsubstantial and frivolous, it should not have dismissed the complaint for want of jurisdiction of the subject matter." *Baker*, at p. 199.⁹² This direction of the Court in *Baker* merely reflected the admonition of Chief Justice Marshall in *Marbury* that "the judicial power of the United States is extended to all cases arising under the constitution." *Marbury v. Madison*, *supra*, at p. 178.⁹³

⁹² As the Court of Appeals opinions point out in addition to a finding that the case "arises under the Constitution" we can hardly conclude that Mr. Powell's claim to a seat in the House fails to present a case or controversy as those terms must now be construed". 395 F.2d at 590. Finally the Court of Appeals concluded that jurisdiction is clearly based on 28 U.S.C. 1331 (a), representing an "affirmative jurisdictional grant here", 395 F.2d at 591.

⁹³ It is extremely interesting while Mr. Justice Harlan dissented from the ultimate conclusion of the Court in *Baker* as to the issue of justiciability, he was emphatically in agreement that justiciability as a concept is wholly interwoven into the definition of the constitutional question involved and that resolution of the so-called "political question" doctrine was impossible without defining and considering the constitutional merits of the question. Thus, Mr. Justice Harlan wrote in his *Baker* dissent: "Until it is first decided to what extent that right is limited by the Federal Constitution, and whether what Tennessee has done or failed to do in this instance runs afoul of any such limitation, we need not reach the issues of 'justiciability' or 'political question' or of any of the other considerations which, in such cases as *Colegrove v. Green*, 328 U.S. 549, led the Court to decline to adjudicate a challenge to a state apportionment affecting seats in the federal House of Representatives, in the absence of a controlling Act of

B. *The subject-matter of this suit was justiciable and the opinions of the lower courts dangerously undermine the historic constitutional role of the Federal Judiciary as the guardian of the civil and political liberties of the people.*

The extraordinary confusion in the District Court in holding that the complaint is "dismissed for want of jurisdiction of the subject-matter" resulted in precisely the "significant" consequences prophesied in *Baker*. Since the district court confused "justiciability" with federal subject-matter jurisdiction, it never proceeded to "the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker, supra*, at p. 198.

In the setting of this case this failure of the District Court had the most serious juridical and national consequences. By failing to decide these questions, it could not possibly resolve properly fundamental issues of justiciability, *Baker v. Carr, supra*; leaving unresolved questions of "transcendent constitutional importance," Respondents' Memorandum *supra*, p. 3, the resolution of which is required in the interest not only of the parties here involved, but the Nation itself.

(i) *The claim that the refusal of the majority of the House to seat a duly elected Representative of the people who meets all constitutional qualifications for membership in the House violated the Constitution, is clearly justiciable.*

In the words of Mr. Justice Brennan for the Court in *Baker v. Carr*, quoting from *Nixon v. Herndon*, 273 U.S. 536, 540, the conclusion of the District Court that this con-

Congress", *supra*, at p. 331. (Emphasis added.) Cf. Mr. Justice Harlan's interesting discussion of the inevitable intertwining of the issues of justiciability with the constitutional merits of the case in his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497.

cededly grave contention is non-justiciable "is little more than a play on words." *Baker, supra*, at p. 209. As the Court points out, "of course the mere fact that the suit seeks protection of a political right does not mean that it presents a political question." *Baker*, at p. 209. The Court then proceeded to what is the heart of the analysis of the so-called "political question doctrine":

"Much confusion results from the capacity of the 'political question' label to obscure the need for a case-by-case inquiry. *Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is in itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution,*" at p. 211 (emphasis added).

This is the very essence of the error of the lower courts. In order to decide whether "a matter has been in any measure committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed," *Baker, supra*, at p. 211, is "itself a delicate exercise in constitutional interpretation." But this is precisely what the lower Courts refused to do and what this Court is now called upon to do as the "ultimate interpreter of the Constitution." *Baker, supra*, at p. 211.

The lower courts refused to engage in the necessary judicial role which the case requires. They declined to meet their responsibility under Article III, the "delicate exercise in constitutional interpretation" which can alone answer the question as to whether the matter is one in "the performance of which entire confidence is placed by our Constitution," *Cf. Marbury v. Madison, supra*, at 162, in the Legislature.

This is the key to this case. If our analysis of Article One, Clause 2, and Article One, Clause 5 is correct—if it was the firm intention of the Framers that the legislature was to have no power to alter, add to, vary or ignore the constitutional qualifications for membership in the House, if the state conventions would have refused to ratify the Constitution had they believed that the Constitution gave to the legislature any power to refuse to seat such an elected representative who met the qualifications set forth in the written Constitution, if indeed the House has no constitutional power to refuse to seat a duly elected representative of the people who meets all constitutional qualifications for membership—then the “matter” here, the question as to who may be the freely chosen representatives of the people to the legislature which govern them, has *not* been confided by the Constitution to the exclusive control of the legislature itself. Quite to the contrary, as we have demonstrated in some depth, this is precisely a matter which has been confided by the Constitution to the ultimate branch of our Government—the people themselves, and the written document they established as their fundamental law. *Marbury v. Madison*, *supra*. As we have fully demonstrated in Point I, A, *supra*, the fundamental premise of representative democracy *requires* that issues deeply involving the free choice of representatives of the people be specifically excluded from the control of the legislature. This is then a classic example of where judicial power *must* be exercised when “the action of that branch [in this case the legislature] exceeds whatever authority has been committed [to it]” *Baker v. Carr*, *supra*, at 211.⁹⁴

As a matter of fact this Court has already made quite clear

⁹⁴ These words, quoted by Mr. Justice Douglas, are from the opinion of Judge McLaughlin in *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220, 236, later dismissed as moot, 256 F. 2d 728. *Baker, supra*, at p. 249.

its opinion that matters involving the free choice of Representatives to the Federal Congress are in every sense justiciable controversies. This question was discussed in full in *Baker v. Carr*, as a building block in what was to the Court a more difficult hurdle: the justiciability of federal interference with the selection of *state* legislators. Thus in supporting its conclusion of justiciability in cases concerning the choice of members of a *state* legislature the Court relied heavily upon its prior conclusions that controversies involving the free choice of Representatives to the Federal Congress involving interpretations of Article One, Clause 2, and Article One, Clause 5, were justiciable. Thus the Court wrote:

"We have already noted that the District Court's holding that the subject matter of this complaint was non-justiciable relied upon *Colegrove v. Green*, *supra*, and later cases. Some of those concerned the choice of members of a state legislature, as in this case; others, like *Colegrove* itself and earlier precedents, *Smiley v. Holm*, 285 U.S. 355, *Koenig v. Flynn*, 285 U.S. 375, and *Carroll v. Becker*, 285 U.S. 380, concerned the choice of Representatives in the Federal Congress. *Smiley*, *Koenig* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision. On the issue of justiciability, all four Justices comprising a majority relied upon *Smiley v. Holm*, but in two opinions, one for three Justices, 328 U.S., at 566, 568, and a separate one by Mr. Justice Rutledge, 328 U.S. at 564. The argument that congressional redistricting problems presented a 'political question' the resolution of which was confided to Congress might have been rested upon Art.

I, §4, Art. I, §5, Art. I, §2, and Amendment XIV, §2. Mr. Justice Rutledge said: 'But for the ruling in *Smiley v. Holm*, 285 U.S. 355; I should have supposed that the provisions of the Constitution, Art. I, §4, that 'The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .'; Art. I, §2 [but see Amendment XIV, §2], vesting in Congress the duty of apportionment of representatives among the several states 'according to their respective Number'; and Art. I, §5, making each House the sole judge of the qualifications of its own members, would remove the issues in this case from justiciable cognizance. *But, in my judgment, the Smiley case rules squarely to the contrary, save only in the matter of degree. . . .* Assuming that that decision is to stand, I think . . . that its effect is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable." 328 U.S., at 564-565. Accordingly, Mr. Justice Rutledge joined in the conclusion that the case was justiciable, although he held that the dismissal of the complaint should be affirmed. His view was that 'The shortness of the time remaining [before forthcoming elections] makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek . . . I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction. Accordingly, the judgment should be affirmed and I join in that disposition of the cause, 328 U.S., at 565-566." *Baker v. Carr, supra*, pp. 232, 233 (emphasis added).

This discussion in Mr Justice Brennan's opinion for the Court (joined in by the Chief Justice and Mr. Justice

Black), relying upon "our decisions in favor of justiciability even in light of these provisions" [Article One, Section 2, 4 and 5], *supra*, at 234, reflects the sharply expressed words singled out by Mr. Justice Douglas [in his concurring opinion in *Baker*]. "It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired." ⁹⁵ *Baker, supra*, at p. 249.

⁹⁵ It is of some significance that the Select Committee of the House itself virtually conceded in its formal report that if the House rejected its recommendations and proceeded to exclude the Member-Elect from his seat, such an action would be subject to judicial review. Thus the Select Committee unanimously gave these views on the question of justiciability to the entire House:

"C. THE SCOPE OF JUDICIAL REVIEW:

Pertinent to the issue of judicial reviewability of the action recommended by this Select Committee is recent language of the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962), where the Court enumerated various factors which establish that a case before it involves 'political' (and therefore nonjusticiable) questions:

'Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; * * * or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; * * * or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'

See also *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929); *Sevilla v. Elizalde*, 112 F. 2d 29, 38 (D.C. Cir. 1940); *Keogh v. Horner*, 8 F. Supp. 933 (S.D. Ill. 1934); *Application of James*, 241 F. Supp. 858, 860 (S.D.N.Y. 1965).

In *United States v. Johnson*, 337 F. 2d 180 (4th Cir. 1964), *aff'd* 383 U.S. 169 (1966), where it was held that the Speech or Debate clause precluded a criminal prosecution based on a Member's speech on the floor of the House, the Fourth Circuit stated (p. 190):

"This does not mean that a Member of Congress is immune from sanction or punishment. Nor does it mean that a Member may with impunity violate the law; it means only that the Constitution has clothed the House of which he is a Member with the sole authority to try him. In this respect the Constitution has made the Houses of Congress independent of other departments of the Government. These bodies, the Founders thought, could be trusted to deal fairly with an accused Member and at the same time do so with proper regard for their own integrity and dignity."

(Footnote continued from preceding page)

Nevertheless, cases may readily be postulated where the action of a House in excluding or expelling a Member may directly impinge upon rights under other provisions of the Constitution. In such cases, the unavailability of judicial review may be less certain. Suppose, for example, that a Member was excluded or expelled because of his religion or race, contrary to the equal protection clause, or for making an unpopular speech protected by the first amendment (cf. *Bond v. Floyd*, — U.S. —, 87 S. Ct. 339 (1966)). The instant case, of course, does not involve such facts. But exclusion of the Member-elect on grounds other than age, citizenship, or inhabitancy could raise an equally serious constitutional issue. The Supreme Court has stated in *Baker v. Carr*, *supra* (369 U.S. at 211):

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of Government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." Report of Select Committee, *supra*, at p. 30.

Many Members of the House expressed the same view as the Select Committee that exclusion of a Member for reasons other than lack of constitutional qualifications would subject the action of the House to inevitable judicial review. See, for example, the comments of Congressman Moore, the ranking Republican Member of the Select Committee:

"If Members lay it aside and torture their consciences that we have not done enough to punish the Member-elect from the State of New York, I would only take a moment to say that in their desire to mete out the maximum punishment, if there is anything greater—I do not say this with any sense of levity or trying to be humorous—if there is any greater punishment and humiliation than that which we have meted out to him, if they desire to approach the problem of expulsion or exclusion, they could very well be on a collision course with courts of this land. Some would care not to have such a circumstance present itself.

"But the fact that must visit with us here today is: Do we want to handle the problems of this Member-elect from the 18th Congressional District of New York on the wisest and most permanent course, or do we as Members want to be continually harassed over the next number of years determining whether or not we are right in the procedures and determination that we make, or whether the courts of the land may have a superior thought?"

Cong. Rec., *supra*, H. 1921 [emphasis added].
and the comments of Congressman Burton:

"In my view, the Supreme Court would have to rule that the gentleman was an inhabitant of the State of New York and duly elected by his constituency to represent them in the House and that the Court
(Footnote continued on next page)

Perhaps one of the most eloquent expressions of the principles underlying the decision of the Court in *Baker* upholding justiciability of the cause then before the Court, which compels a similar conclusion here as to justiciability, is to be found in the closing words of Mr. Justice Clark's concurring opinion:

"As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, *a chief function of the Court is to secure the national rights. Its decision today supports the proposition for which our forbears fought and many died, namely, that to be fully conformable to the principle of right, the form of government must be representative.* That is the keystone upon which our government was founded and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. *National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court. Baker, supra, at 261, 267, (Emphasis added.)*

The issue presented in this appeal is, in Mr. Justice Clark's

would order seating him if this House should ill-advisedly fail to do so."

Cong. Rec., *supra*, H. 1925.

and the comments of Congressman Teague, a Member of the Select Committee:

"I believe that substantial majority of the American people will support us when we explain to them:

"First. That there are serious problems of constitutional law involved in this whole matter. If we refuse to seat MR. POWELL, this case could well be in the courts for years."

Cong. Rec. *supra*.

words, "the keystone upon which our government was founded and lacking which no republic can survive." It is that "the form of government must be representative." We believe, with Mr. Justice Clark, that "national respect for the courts is more enhanced through the forthright enforcement of those rights than by rendering them nugatory through the interposition of subterfuges." It is in this sense that firm, decisive and speedy judicial action in vindication of the rights here asserted by the Petitioners would be "in the greatest tradition of this Court." *Baker, supra* at p. 267.

In *Reynolds v. Sims*, 377 U.S. 523 (1964), the Court once again faced the issue of justiciability in terms which are determinative here. The Court reminded the Nation, through the words of the Chief Justice, that:

"Undoubtedly the right of suffrage is a fundamental matter in a free and democratic society. *Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.*" *Reynolds v. Sims*, 377 U.S. 533 (emphasis added).

The District Court declined to accept this high responsibility on the expressed fear that it would "crash through a political thicket into political quicksand." The answer of the Chief Justice for the Court in *Reynolds* to this same rationale for refusing to accept the responsibilities thrust upon the national courts by the Constitution remains the most effective response today to the District Court's abdication of its constitutional role:

"We are cautioned about the dangers of entering into political thickets. . . . Our answer is this: a denial of constitutionally protected rights demands judicial

protection; our oath and our office require no less of us."

Reynolds, supra, at p. 566.

One of the most recent pronouncements of the Court in this area removes whatever question there might ever have been concerning the justiciability of the issues presented in this appeal. The opinion of Mr. Justice Black for the Court in *Wesberry v. Sanders* is completely determinative. The matter before the Court in *Wesberry*, as here, charged a violation of Article I, Clause 2. The opinion of the Court sustaining justiciability and rejecting the "political question" doctrine as inapplicable, is wholly instructive here. As the Court held in *Wesberry*:

"The reasons which led to these conclusions in *Baker* are equally persuasive here. Indeed, as one of the grounds there relied on to support our holding that state apportionment controversies are justiciable we said:

'... *Smiley v. Holm*, 285 U.S. 355, *Koenig v. Flynn*, 285 U.S. 375, and *Carroll v. Becker*, 285 U.S. 380, concerned the choice of Representatives in the Federal Congress. *Smiley*, *Koenig* and *Carroll* settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision.'

"This statement in *Baker*, which referred to our past decisions holding congressional apportionment cases to be justiciable, we believe was wholly correct and we adhere to it. Mr. Justice Frankfurter's *Colegrove* opinion contended that Art. I, §4, of the Constitution had given Congress 'exclusive authority' to protect the right of citizens to vote for Congressmen, but we made it clear in *Baker* that nothing in the language of that article

gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*, 1 Cranch 137, in 1803. Cf. *Gibbons v. Ogden*, 9 Wheat. 1. The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I. This dismissal can no more be justified on the ground of 'want of equity' than on the ground of nonjusticiability.' We therefore hold that the District Court erred in dismissing the complaint (emphasis added) at pp. 6,7.

The impact of Mr. Justice Black's reasoning in *Wesberry* upon this appeal is clear. Nothing in the Constitution has given to the Congress "exclusive authority" to protect the free choice of Representatives to the Legislature by the people themselves. "The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." The extraordinary interpretation of the "political question doctrine" indulged in by the lower courts and sanctified by magical invocation of the phrase "separation of powers" would, if sustained, remove "the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury v. Madison*." *Wesberry*, *supra*, at p. 6.

Mr. Justice Black places his finger at the very core of the problem in the District Court's opinion. In its effort to avoid "political quicksand" it seeks to overturn over 150 years of American judicial history. The questions which the District Court refused to face have been held to be the solemn duty of American federal courts to resolve, as Mr. Justice Black reminds us, ever since the historic decision in

Marbury v. Madison. It is too late in the life of this Republic for the principles of *Marbury v. Madison* to be "easily distinguishable on its facts." Opinion of District Court. In *Marbury* the Chief Justice wrote in words which have guided this Court now for 150 years: "the powers of the legislature are defined and limited; and that these limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison, supra*, at p. 175. The District Court appears to believe that where an action violative of fundamental rights of citizens challenged as beyond the powers assigned by the Constitution to a given branch of government is an action taken by the Legislature, the label "separation of powers" forbids judicial intervention. In the words of Chief Justice Marshall, written in perhaps an even more serious period of challenge and confrontation, "this doctrine would subvert the very foundations of all written constitutions . . . It would declare that if the legislatures shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be given to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure . . . it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution . . ." *Marbury v. Madison, supra*, at p. 178.

We respectfully suggest that a Court which has so recently placed at the very center of its own conception of its role and responsibility to the Nation its power "to protect the constitutional rights of individuals from legislative destruction, a power recognized since our decision in *Marbury v. Madison*," *Wesberry, supra*, at p. 6, should forthwith re-

verse decisions of lower courts which so undermine the entire juridical foundation upon which the ever increasing importance of the national courts in the protection of the rights of citizens rests.⁹⁶

Only this Term the Court has reaffirmed its past decisions that the issue here presented is a question appropriate for judicial review. In *Williams v. Rhodes*, — U.S. — (#543-544 October Term, 1968, October 15th, 1968) the respondents in that action urged that questions arising under Article II, Section One involving the selections of presidential electors was a "political question" and hence non-justiciable. In his opinion for the Court Mr. Justice Black pointed out that "that claim has been rejected in cases of this kind numerous times". In rejecting the contention that the questions concerning the selection of presidential electors were in some fashion removed from juridical competence by the Constitution, Mr. Justice Black took the occasion to reassert the holding of this Court in *MacPherson v. Blacker*, 146 U.S. 1. The teaching of the Court in *MacPherson* is particularly appropriate here. In *MacPherson* as here the central argument against justiciability was the contention that the legislature might disregard the decisions of the judicial branch on the question involved and that accordingly this was not an issue which the Courts ought to reach. The response of this Court to such an argu-

⁹⁶ The reactions of the Chairman of the House Judiciary Committee, Mr. Celler, and a respondent in this action, as reported in the press directly after the rejection of the Select Committee's recommendation, is interesting:

"Leaving the House floor after the long debate, Celler said, 'if I were Powell's lawyers, I'd go into court immediately. I think he's got a good case.'"

See, also, *New York Times*, March 5, 1967:

"Mr. Celler pointed out that Mr. Powell had met the enumerated qualifications for House membership, and 'it is plain that the Constitution meant to exclude all others.' He added, 'If I was Powell's lawyer, I'd go into Federal court.'"

ment was sharp and clear and in every way appropriate to the present case:

"The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own."

As in *MacPherson* any inference that the profound constitutional questions here presented should not be adjudicated by the judicial branch out of some latent fear that the legislative branch might not accept its conclusion is an "inadmissible suggestion", *MacPherson v. Blocker, supra*. Under the Constitution this Court "cannot decline the exercise of [its] jurisdiction" upon any such suggestion. Such an approach would "subvert the very foundations of all written constitutions." *Marbury v. Madison* at p. 176.

- (ii) *The remaining constitutional questions are uncontestedly justiciable and Respondents do not seriously question the appropriateness of judicial consideration of these contentions.*

No serious contention can be made that the remaining constitutional issues presented in the case are non-justiciable. Both the lower courts and the Respondents prefer to handle this dilemma by ignoring the claims. This is understandable since these questions are traditionally the subjects for judicial review.

(a) A claim that a legislative action violates the Bill of Attainder Clause as a "legislative act which inflicts punishment without a judicial trial", *Cummings v. Missouri, supra*, p. 76, is traditionally a proper subject for judicial review. *Marbury v. Madison, supra*, at p. 178, singles out

judicial intervention to defend the prohibition against legislative Bills of Attainder as a classic example of a proper judicial inquiry. The precise question was discussed and settled in *United States v. Lovett, supra*. The Government urged that the measure there challenged was appended to an appropriations bill and since "Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which the Congress has final say", *United States v. Lovett*, at p. 313. The Court, speaking through Mr. Justice Black, flatly rejected this argument pointing out that "were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could not be challenged in any Court. Our Constitution did not contemplate such a result", *United States v. Lovett, supra*, at p. 314.⁹⁷ See, also, *Cummings v. Missouri, supra*, *United States v. Brown, supra*.

(b) A claim that the punishment of exclusion from membership in the House violated the Due Process Guarantee of the Fifth Amendment, see Point I.C, *supra*, p. , is patently justiciable. See *United States v. Ballin, supra*: "It [the House] may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relationship between the mode or method of proceeding established by the rule and the result sought to be obtained." See, also, *Murray's Lessee v. Hoboken Land*

⁹⁷ Mr. Justice Black quotes from Hamilton's famous discussion in Federalist Paper No. 78: "... a limited constitution . . . [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practise no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

and *Improvement Co., supra*: "The article [Due Process Clause] is a restraint on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." The concurring opinion in *Newberry v. United States, supra*, adopted approvingly in *United States v. Classic, supra*, clearly impels the conclusion that action of the House under color of Article One, Section Five is subject to judicial inquiry where it is not an action "based upon reasonable consideration of pertinent matters of fact according to established principles of law", *Newberry v. United States, supra*, at 285. The precise issue of justiciability of a claim of violation of due process under a proceeding of the Senate pursuant to its power under Article One, Clause Two were before the Court in *Barry v. United States ex rel. Cunningham*, 279 U.S. 597. The Court carefully stated that proceedings of the Senate pursuant to the powers bestowed upon it by Article I, Clause Five were "subject only to the restraints imposed by or found in the implications of the Constitution", 279 U.S., at 614, and that "judicial interference can be successfully invoked only upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law", 279 U.S. at 620.

(c) A claim that the exclusion of the Petitioner violated his rights and the rights of the overwhelming Negro majority of his district guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments, see Point One, *supra*, is also a traditional subject of judicial review as we have pointed out above. In *Bond v. Floyd, supra*, this Court pointed out that even the State of Georgia "does not claim that it should be completely free of judicial review whenever it disqualifies an elected Representative; it admits that, if a state legislature excluded a legislator on

racial or on other clearly unconstitutional grounds, the federal (or state) judiciary would be justified in testing the exclusion by federal constitutional standards." *Bond v. Floyd*, at p. 347.⁹⁸

C. *This Court has ample power to grant whatever relief is required to remedy the violations of Petitioners' constitutional rights.*

(1) The relief requested by Petitioners are the normal judicial remedies traditionally designed to "protect the constitutional rights of individuals for legislative destruction" *Wesberry v. Sanders*, *supra*. They include conventional requests for injunctive and declaratory relief against the enforcement of an unconstitutional action of a legislature, the resolution permanently barring Mr. Powell from membership in the entire 90th Congress. See *Ex parte Young*, 209 U.S. 123; *Dombrowski v. Pfister*, 380 U.S. 479; Cf. *Marbury v. Madison*, *supra*.

(2) In addition, Petitioner sought the issuance of a writ of mandamus directed to the Speaker of the House ordering that officer to swear in the Petitioner as the Representative from the 18th Congressional District of New York. For some reason this request has created the greatest degree of consternation among the Respondents. But this is no novel issue of law. The availability of a writ of mandamus under these circumstances was settled in 1803 in *Marbury v. Madison*. In *Marbury*, petitioners sought a writ of mandamus against an exalted officer of the Executive Branch, the Secretary of State. Then, as now, the Respondents urged that in some way, the issuance of such a writ would be to "intrude into . . . the prerogatives . . ." of another Branch.

⁹⁸ Cf. the position taken by counsel for the Respondent on oral argument before the Court of Appeals in response to a question from the bench that he saw no power of judicial review in the courts even if the House excluded a Member-Elect for racial grounds. See transcript of oral argument.

Marbury v. Madison, *supra*, at p. 168. The answer of Chief Justice Marshall to this fear established principles of law which guide us to this day. In words most appropriate to the present case, the Chief Justice wrote:

"If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone, exempts him from being sued in the ordinary mode of proceedings, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

Marbury v. Madison, at p. 170.

Resting upon this essential democratic philosophy the Chief Justice concluded with the now famous words which are here determinative:

"It is not the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." *Marbury* at P. 170.

Here, as in *Marbury*, "this, then, is a plain case for a mandamus. The ancient writ required "whenever there is a right to execute an office, perform a service, or exercise a franchise . . . this court ought to assist by mandamus upon reasons of justice, as the writ expresses, and upon reasons of public policy to preserve peace, order and good government." ⁹⁹ As in *Marbury*, the Petitioner here "has a right in this case to execute an office of public concern, and is kept out of possession of that right." *Marbury, supra*, at 169.

⁹⁹ The Chief Justice in *Marbury* takes this definition from Lord Mansfield's opinion in *The King v. Baker et al.*, 9 Burr. 1267.

The state courts have consistently followed the principles of *Marbury*: that a writ of mandamus may issue in the circumstances of this case. In *State v. Elder*, 47 N.W. 710 (1891):

"... relator-plaintiff applied for a writ of mandamus to compel the Speaker of the House of Representatives of Nebraska to open and publish the returns of the general elections of 1890 under Art. 5, Sec. 4 of the State Constitution on the ground that plaintiff met the requirements for eligibility and had received a plurality of the votes for the office."

Rejecting the argument of the defendant Speaker—that as the presiding officer of a co-ordinate branch of the government, the court had no power to issue a mandamus directing him to act—the Supreme Court of the State of Nebraska held that a writ of mandamus would lie. The opinion held that,

"... in considering the public, political aspect of the question presented, . . . [it is necessary to keep in mind], the no less important one of the rights of parties to a redress of grievances against those in high temporary power, as well as those in lower official station. [It is argued] . . . that the officers of each department of that government are responsible directly to the people, and not to the judicial department, for their acts. This doubtless means that an aggrieved party—for example, one who has been elected to an office, the returns of which had been refused to be canvassed and certified by a state board of canvassers—has no right of remedy in the courts, nor other redress than his future opposition to the exercise of arbitrary power as one of the people. This policy, if followed to its conclusion, would tend to make elections uncertain in result, doubly so as to the result declared. . . . But such

has never been understood to be the law of this state” (at p. 713).

In his concurring opinion, Judge Maxwell further explained:

“... it is said that the legislature is a coordinate branch of the government, and that it is entitled to construe the constitution and statutes for itself, and therefore is not governed by the construction placed upon it by the Supreme Court. That it is a very important coordinate branch of the government is true, and the Supreme Court has never, except when its action was invoked in some of the modes pointed out by law, sought to construe statutes or constitutional provisions for the legislature. It is the province of the legislature, however, to pass laws, and of the courts to construe the constitution and the laws. . . . One of the duties imposed upon the Supreme Court is to construe the constitution and the laws of the state . . . and such construction binds every department of the government, including the legislature, and every person within the state. The construction given by the Supreme Court becomes the standard to be applied in all cases.

“In a free government, no person is above the law. All are bound by its provisions . . . when a person is elected to the legislature, he, in effect, agrees to perform all the duties enjoined upon him by the constitution and statutes. . . . In accepting this trust, he accepts it with all its incidents, viz., that, for a failure or neglect to perform the duty required, any of the parties aggrieved may invoke the aid of the courts to enforce performance . . . in case of failure to perform the trust; and it is the duty of the court to enforce the rights of the parties aggrieved” (at pp. 715, 716) (emphasis added).

Judge Maxwell went on to emphasize the fundamental philosophy of government so eloquently put forth in the early days of the republic in *Marbury v. Madison* which requires the issuance of the writ here requested:

“It seems to be assumed in the answer that the legislature has the power, and that, therefore, at its option, it may declare whomsoever it pleases of the candidates voted for elected. This is a government of the people, by the people, and for the people. The constitution and laws have provided a mode in which the will of the people shall be ascertained, viz., by a canvass of the votes, and the persons whom the people have elected, as shown by such returns, are to be officers for the succeeding two years, unless, for causes which appear behind the returns, they are not entitled to exercise the duties of such offices. . . . Should the procedure set forth in the answer [of respondent speaker] be adopted, the tendency, if not the effect, would be to transfer from the people the election of its own officers, and invest the legislature with that duty” (at p. 717).

Judge Maxwell, again in the spirit of *Marbury v. Madison*, completely refutes the contentions of Respondents here—that Respondents are immune to the remedial directions of this Court:

“[The Constitution] requires the parties elected on the face of the returns to be declared elected and inducted into office. It is said that the Supreme Court has no supervision over other departments of the government. That is conceded. It has not sought to exercise any; nor has it any supervision over the affairs of any educational institution, railway company, bank, partnership, or individual in the state. Nevertheless, if any person aggrieved by any of these parties or others in-

vokes its power, in the manner provided by law, to redress his wrongs, and grant him relief, the courts have authority to entertain jurisdiction, and render a decision confirming his rights, and redressing his wrongs. The law covers the whole state. It applies alike to every individual therein, be he rich or poor, black or white. The remedy is as broad as the law, and the courts apply the remedy. If this were not so, the wealthy corporation or individual might trample upon the rights of the weak and poor, and override the law, and justice be despised and defeated. Every denial of justice, when the relief has been sought in a proper manner, is an act of tyranny, which tends to the subversion of free government." (at p. 716).¹⁰⁰

In view of the commitment of this nation to the protection of the "essentials of a democratic society" and the clear violation of that principle by the House action here at issue, "... [i]t is emphatically the province and duty of the judicial department ..." to provide a remedy for the wrongs done. *Marbury v. Madison*, *supra*.

The Great Chief Justice wrote in *Marbury*:

"... it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." Cranch, at p. 163.

¹⁰⁰ See also *State ex rel. Donnell v. Osburn*, 147 S.W.2d 1065 (1941) (Mandamus issued to the Speaker of the State House of Representatives, the court quoting *State v. Elder*, *Re v. Barker*, and *Marbury v. Madison*); *State v. Town Council of South Kingston*, 27 A. 559.

Mr. Justice Fortas has recently restated the traditional concepts expressed in *Marbury* and subsequent cases that courts must give protection to citizens "whenever there is a right to execute an office." See his opinion in *Fortson v. Morris*, — U.S. —,

"It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office—the effect given to the vote, that is protected." (87 S.C. at 456.)

It is a first principle of a court of law that the court has power to fashion a remedy for redress of a legal wrong. As Mr. Justice Douglas, concurring in *Baker v. Carr, supra*, stated:

"... any relief accorded can be fashioned in light of well known principles of equity."

What is here requested of the Court is wholly within the traditional role of the Court and established juridical notions as to the extent of its powers. It is inconceivable to us that the House of Representatives, which justly considers itself among the outstanding assemblies of representative governments in the world, would refuse to accept a mandate which, by the Constitution, this Court (see *Reynolds v. Sims, supra*) is empowered, and indeed under its oath of office is required, to hand down.¹⁰¹

It would be demeaning to the House of Representatives of this great nation to suggest that it would not adhere to the time-honored words of this Court that "the government of the United States has been emphatically termed a government of laws and not of men." *Marbury v. Madison, supra*, at p. 162. Like *Marbury*, this is a "delicate case" (at p. 168). And as in *Marbury*, we are confident that the House is deeply committed, as indeed are all Americans, to the proposition that "it is emphatically the province and duty of the judicial court to say what the law is." *Marbury* at p. 175.¹⁰²

¹⁰¹ It should be noted that in light of the recent action taken by the House on January 3rd, 1969, the necessary remedial orders of the Court would not involve a mandamus to seat the petitioner but rather conventional remedies of declaratory judgment and relief directed against agents and employees of the House. Cf. *Kilbourne v. Thompson, supra*; *Youngstown Steel Company v. Sawyer, supra*.

¹⁰² The comment of the Chief Justice in *Marbury* is interesting in this respect:

This case then calls in question "the very essence of civil liberty [which] consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *Marbury* at p. 163.^{102a}

POINT THREE

The Court of Appeals Opinions avoid the responsibility placed upon the national courts to adjudicate this controversy.

The three opinions of the Court of Appeals reflect unusual exercises in judicial creativity which appear to be

"In Great Britain the King himself is sued in the respectful form of petition and he never fails to comply with the judgment of his court." *Marbury* at p. 163.

^{102a} The refusal of the District Court to certify the necessity for a three-judge statutory court was clearly erroneous. The issues raised are conceded by all to be of "fundamental constitutional significance." Respondents' Memorandum, *supra*. The Court of Appeals itself is of the view that "novel issues of substantial public importance" are involved. (Appendix D, p. A-16). Federal subject matter jurisdiction was clearly present. See Point II, *supra*. Since the enjoining of congressional action was requested, 28 U.S.C. 2282 may have required the certification of a three-judge court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713; *Schneider v. Rusk*, 372 U.S. 224; *Reed Enterprises v. Corcoran*, 354 F.2d 519 (App. D.C.);

If this statutory duty of the District Court had been met, a prompt hearing on the constitutional issues as well as issues of justiciability raised by the Respondents would have already occurred, see *Idlewild Bon Voyage Liquor Corp. v. Epstein*. Direct appeal to this Court by either party, allowed by the statute, of the "novel issues of substantial public importance" would have permitted the early resolution of these issues, admitted by all as essential to the public interest (see Order of Court of Appeals of May 10, App. D, p. A-16) and the statement of Respondents in their Memorandum to the Court of Appeals. Accordingly, if this Court believes that a three-judge statutory court should have been convened, we respectfully suggest that the Court of Appeals be directed to order the District Court to certify the necessity for such a court, that such a court be forthwith convened, and that this Court direct the statutory district court to issue forthwith the relief prayed for herein.

designed primarily to avoid the bedrock responsibility of the Court "as ultimate interpreter of the Constitution". *Baker v. Carr*, supra at p. 211. We have suggested that in essence this appeal presents once again the necessity of reaffirming the fundamental importance of a written constitution to the system of government sought to be established by the Founders. As in the early days of the Republic this case compels the question "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, supra, at p. 175. A close analysis of the opinion of Circuit Judge Burger for the Court and the concurring opinions of Judge McGowen and Leventhal reveals that the complicated rationales developed below serve only to mask the inevitable conclusion that the Court of Appeals failed to meet the high responsibilities placed upon the national judiciary by the Constitution itself:

a) *The opinion of Circuit Judge Burger*

1. Circuit Judge Burger in his opinion announcing the decision of the Court acknowledges, as does his concurring brothers, the fatal weakness of the district court opinion in summarily dismissing the cause for want of subject matter jurisdiction. Rejecting the simplistic analysis urged on the district court by the respondents, Judge Burger and his colleagues unanimously agree that a) this is a case which "arises" under the Federal Constitution, that b) the complaint presents a "case or controversy" within the meaning of Article III jurisdiction, and that c) Title 78 U.S.C. 1331 (c) constitutes a statutory grant of jurisdiction over the cause to the federal courts. Accordingly all three Circuit Court Judges concur in their separate opinions that the district court erroneously dismissed the action for want of

jurisdiction under the guiding principles enunciated by this Court in *Baker v. Carr*.

Having found that "under *Baker* jurisdiction arises", Circuit Judge Burger turned to the more complex and subtle question as to whether the admitted jurisdiction *ought* to be exercised in this case. Once again Judge Burger sought guidance in this Court's analysis of the admittedly elusive concept of the "political question" doctrine. Conceding that problems in justiciability are not susceptible of solution through the simple application of convenient labels, Judge Burger attempted to apply to this case the "six factors" which Mr. Justice Brennan in his opinion for the Court in *Baker* found to be "prominent on the surface" of a "political question" case. But a close examination of Judge Burger's utilization of the *Baker* criteria reveals an essential failure to grasp the essence of the *Baker* analysis itself.

Central to Justice Brennan's approach to the question of justiciability in *Baker* is the formation of the first of the "criteria" suggested as determinative in the definition of a "political question", namely the existence of a "textually demonstrable constitutional commitment of the issue to a coordinate political department", *Baker v. Carr, supra*. Mr. Justice Brennan points out in *Baker* that the application of this first criteria itself calls for a "delicate exercise in constitutional interpretation". It requires a decision as to whether the Constitution itself has committed the issue presented by the complaint for judicial decision to the sole determination of another coordinate branch of the government. This threshold decision as to the meaning of the Constitution is a "responsibility of this Court as ultimate interpreter of the Constitution" *Baker v. Carr*, at p. 211. But this is *precisely* the responsibility which the Court below refuses to accept. The central issue which the first criteria of *Baker* requires a judicial resolution of, is whether the

question as to who may be an elected representative of the people has been committed by the Constitution to the sole determination of the Legislature. But this is the very question which the lower court scrupulously avoids settling.

This question, the resolution of which is essential in resolving the issue of justiciability, is in fact, at the heart of the constitutional issues raised by this case. At the very center of petitioners' contentions is the proposition that the founding fathers had no intention whatsoever to "commit" to the sole discretion of the Legislature the issue as to the nature of the qualifications for membership in the House of Representatives. This was a concept as we have pointed out which was considered fundamental to the very structure of representative government. It was in the words of Madison "improper and dangerous"* to commit the issue of the nature of the qualifications of members of the legislature to that body itself. Far from "committing" any question as to the nature of the qualifications for members in the legislature to the legislature itself the Founders made it perfectly clear that questions as to the qualifications for representatives of the people were reserved to the sovereign people themselves—that these qualifications had been "defined and fixed in the Constitution" were unalterable by the legislature."** As Hamilton said to the New York ratifying convention this reflected the "true principle of a republic—that the people should choose whom they please to govern them."**

This is the crux of the problem. The very constitutional issue which is at the center of this case, and which the lower court refuses to decide, is itself the "delicate exercise in constitutional interpretation" which the Court *must* engage in if the tests of justiciability laid down in *Baker* are to be fairly applied. If petitioners' constitutional contentions are sound the issue of justiciability is resolved. If the power of the House to "judge" the qualifications of its members

granted in Article One is limited to those "qualifications" alone which are "defined and fixed in the Constitution",* then there is no "textually demonstrable constitutional commitment of the issues"*** presented by this case, exclusion of a duly elected representative who meets *all* constitutional qualifications for office, to "a coordinate political department".*** Quite to the contrary, precisely the reverse situation appears—the breach of a "limitation committed to writing" by "those intended to be restrained". *Marbury v. Madison*, *supra*. This is a situation which imperatively calls for the exercise of judicial power. As in *Marbury*, if in its function as the "ultimate interpreter of the Constitution", *Baker v. Carr*, *supra*, the view of the Constitution expressed by Madison and Hamilton is sound, that the Founders, taught by the experiences of the British Parliament, were determined that the legislature shall have no power to refuse to seat duly elected representatives of the people who meet all the constitutional qualifications for membership—then a classic situation for the exercise of judicial power is presented. That the violation of fundamental rights of citizens occasioned by the breach of limitations imposed by the Constitution upon the powers of one of the coordinate branches of government is a "justiciable" issue has been settled since *Marbury*. See *Wesberry v. Sanders*, *supra*, opinion of Mr. Justice Black. The exercise of jurisdiction under these circumstances is the highest responsibility of the judiciary. Upon its exercise depends the existence of the cornerstone of free government—the written Constitution, for as the Chief Justice wrote in *Marbury*, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, *supra*.

The heart of the error in the Court of Appeals' decision lies then in this refusal to engage in the "delicate exercise in constitutional interpretation" which the case calls for.

The simple fact of the matter is that it is quite impossible, as Mr. Justice Harlan points out in both his dissenting opinion in *Baker*, and his dissenting opinion in *Poe v. Ullman, supra*, to settle the issue of justiciability within the confines of the "political question" doctrine within defining and deciding the constitutional question involved. This the lower court refuses to do. But the "political question" doctrine is not a license to reject at will the responsibilities for adjudication which "oath" and "office", *Reynolds v. Sims, supra*, placed upon the national courts. All the conventional tools for the solution of a problem in constitutional interpretation are at hand: the words of the document, powerful evidence of the intention of the Enactors, strong indications of contemporaneous interpretation by the men who participated themselves in the framing of the document. If the constitutional analysis first expressed by Madison and Hamilton and last reflected by this Court in its opinion in *Bond v. Floyd* is sound that the qualifications for membership in the House are fixed in the Constitution and cannot be ignored or disregarded by that body in refusing to seat a representative of the people duly elected who meets all of these qualifications, then the courts have a duty to say so. This is the teaching of this Court from *Marbury to Baker*.

2. The heart of the lower court's analysis as developed in Judge Burger's opinion is the concern expressed that in some way the protection for the right asserted here cannot be "judicially molded." Cf. *Baker v. Carr, supra*. In essence the lower court concedes that the first two facets of the *Baker* approach to justiciability would indicate that the question presented is in fact justiciable. The opinion of Judge Burger virtually admits that in reality the "duty asserted" can be "judicially identified" and its "breach" can be "judicially determined." Cf. *Baker v. Carr, supra*. The lack of justiciability flows rather from a deep felt con-

cern that the relief sought in some fashion is inappropriate for the judicial branch.

The lower court's distress at the nature of the relief requested does not flow, of course, from any concern that appropriate *forms* of relief cannot be fashioned by a court. As we have pointed out above, and as the lower court concedes, the relief requested calls for the most conventional forms of judicially fashioned remedies. The problem which the lower court opinion raises is simply the fear that the officers of the legislative branch may not obey the legal processes of a court thus inducing the possibility of a constitutional "confrontation" potentially destructive of the authority and dignity of both contending branches. This fear of the effect of a "confrontation," at the heart of the conclusion of the lower court that the constitutional questions presented are not justiciable, is conceptually garbed in the language of deference to the doctrine of "separation of powers."

But as we have pointed out before, this Court has taught from *Marbury* to *Williams v. Rhodes* in the present Term, that the suggestion that the judicial branch refuse to meet its obligation to "say what the law is" *Marbury, supra*, out of a fear that its role as the "ultimate interpreter of the Constitution," *Baker v. Carr, supra*, will be disregarded by another branch is "an inadmissible suggestion." *MacPherson v. Blacker, supra*. It is a "suggestion" which would undermine the most fundamental concept of a system of checks and balances. For it is of the essence of the doctrine of "separation of powers" that the "powers" of one branch be not illimitable and be subject to the ultimate "check" when its proscribed limits be transgressed. As Mr. Justice Frankfurter pointed out in a case involving a similar confrontation of constitutional dimensions, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579:

checks upon the transgression of power by the legislature:

The Constitution divides the National Government into three branches—Legislative, Executive and Judicial. This “separation of powers” was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny.

The words of the Chief Justice in *Brown* are particularly appropriate here where once again the Court is called upon to perform its most critical role in guaranteeing that in this Republic “the legislature would not overstep the bounds of its authority.” *United States v. Brown, supra*. Contrary to the assumptions of the lower courts, this role of the Court is *impelled* by the doctrine of separation of powers. As Mr. Justice Brandeis pointed out in his famous discussion in *Myers v. United States*, 272 U.S. 52, 249, 293

“The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.” *Myers v. United States*, 272 U.S. 52, 240, 293.

Where the Court must act, under its constitutional mandate to “preclude the exercise of arbitrary power”, *Myers v. United States, supra*, as this Court has had the occasion to point out in turning point cases in its history, the fundamental considerations underlying the concept of separation of powers requires the Court to fulfill its constitutional duty where a coordinate branch overstep(s) the bounds of its authority”, *United States v. Brown*, confident in the expectation that the other branches will accept its decision as

to the meaning of the fundamental law. Thus in *Youngstown Sheet and Tube Co. v. Sawyer*, *supra*, at a moment of awesome confrontation with the Executive Branch, Mr. Justice Frankfurter, concurring in the Court's exercise of judicial power to restrain the Executive's breach of its constitutional authority wrote the thoughtful words most applicable here:

"It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's wellbeing, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world."

It has been suggested that the House might not accept the conclusions of this Court as to the meaning of the Constitution. This is indeed an "inadmissible suggestion" *MacPherson v. Blacker*, *supra*. The words of Justice Frankfurter in the conclusion to his concurring opinion in *Youngstown* place the question in its proper context:

"In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington."

Over a hundred years ago, in another case of grave constitutional implications, *Ex Parte Milligan*, 4 Wall 2 (1866) -

... A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.

To that end they rested the structure of our central government on the system of checks and balances for them the doctrine of separation of powers was not mere theory: it was felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our day has made vivid the realization that the framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power.

This system of checks and balances contemplates that the fundamental "check" upon the "hazards of concentrated power," *Youngstown Sheet and Tube Co. v. Sawyer, supra*, is the existence of the "written constitution" which imposes the "limitations contained in writing. . . . upon those intended to be restrained" *Marbury v. Madison, supra*. And

the very survival of the written constitution, the fundamental "check," depends upon the role of the national courts as the "ultimate interpreter" of that document. *Baker v. Carr, supra*. This is a first precept of the system of government constructed in Philadelphia at the founding convention. As Hamilton wrote in Number 78 of the *Federalist Papers*:

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . ."

Only recently this Court in the opinion of the Chief Justice in *United States v. Brown* saw fit to reassert the premises underlying the deep felt necessity for the existence of

the suggestion was also made that this Court should hold its hand out of concern that the head of the Executive Branch might have disregarded the conclusions of the Judicial Branch as to the meaning of the fundamental law. In sharp words this Court rejected any such consideration pointing out that "even the suggestion is injurious to the Executive, and we dismiss it from further consideration." *Ex Parte Milligan, supra*. The words of the Court in *Milligan* go directly to the core of this controversy. The "suggestion" of the lower court, in the opinion of Judge Burger, that this matter is not justiciable because the remedies sought might impel a confrontation with the Legislative Branch, is in every way "injurious" to the Legislative Branch itself. It implies that this Branch will reject the most fundamental maxim which underlies the operation of this government, the undertaking that "this is government of laws and not men", *Marbury v. Madison, supra*. It would be "injurious" in the extreme to this controlling concept itself, to suggest that the legislative leaders of the Nation would not accept in good conscience the conclusions of this Court as to the meaning of the fundamental law.* At a moment when every

* See the interesting comments of Congressman Robert C. Eckhardt, (Texas) in the "Adam Clayton Powell Case" 45 Texas Law Review, p. 1211,

"Therefore, it is concluded that the United States House of Representatives acted unconstitutionally in refusing to seat Adam Clayton Powell after finding he had the constitutionally enumerated qualifications for seating, and that the matter presents an issue reviewable by the courts. Therefore, the Supreme Court should direct the appropriate officials to take the necessary steps to seat Powell. If such presents an impasse between two coordinate branches of the federal family, it is an impasse that must be risked every time the least powerful but most deliberative branch decides that the executive or legislative branch has acted unconstitutionally.

In a government in which the importance of the validating function of the Court is so deeply ingrained, the danger of an impasse is small. Certainly, it is not grave enough to cause us to throw away judicial consideration of the constitutional issue and to substitute for it a system by which erratic, legislative cross currents, churned by popular prejudice, may sweep away a man's right to be seated and his constituency's right to select him."

national leader is exhorting the country to reaffirm its commitment to law and order through justice it would be presumptuous to suggest that the leaders of the Legislative Branch of the government would themselves flaunt the dictates of the written Constitution as expressed by that branch of government committed by the Constitution itself to be the "ultimate interpreter" of the fundamental law. Far more destructive of the governing principles of the Republic would be a failure of this Court to accept its constitutional responsibilities out of a misplaced fear of "confrontation" with another branch. The words of Mr. Justice Clark in his concurring opinion in *Baker v. Carr* ring with a clarity which is guding here:

"As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, *a chief function of the Court is to secure the national rights. Its decision today supports the proposition for which our forbears fought and many died, namely, that to be fully conformable to the principle of right, the form of government must be representative.* That is the keystone upon which our government was founded and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. *National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court. Baker, supra, at 261, 267 (emphasis added.)*

The lower court concludes in Judge Burger's opinion that were the judicial branch to "command an elected co-equal

"branch in these circumstances" would be a "blow to representative government." We would respectfully suggest that the opinions of this Court from *Marbury* to *Baker* to *Williams* in this Term teach the contrary. To refuse to exercise judicial power "in these circumstances" would undermine all confidence in the role of this Court as the "ultimate interpreter" of the Constitution; it would be in truth a "blow to representative government."*

3. There is some suggestion in the opinion of Judge Burger that the Speech or Debate Clause of the Constitution may in some manner support the conclusion of non-justiciability in this case. Neither of the two concurring opinions rest upon this ground and Judge Burger's opinion specifically declines to base its conclusion upon the operation of this clause. Nevertheless, since respondents have urged below that the clause operates as an absolute bar to the complaint it is appropriate for us to point out that the clause has never been interpreted by this Court as a barrier to the historic concept of judicial review of the constitutionality of actions of the legislature. Cf. *Marbury v. Madison*, *supra*. As the opinions of this Court have carefully pointed out the historical "taproots" of the clause, *Tenney v. Brandhove*, 341 U.S. 367 are to be found in the efforts of the Tudor and Stuart monarchs to utilize the criminal law to "suppress and intimidate critical legislators." *United States v. Johnson*, 383 U.S. 169, 178. The entire thrust of the legislative privi-

* It should be pointed out that in any event the conclusions of the lower court as to the inappropriateness of the remedies sought sweep far too broadly. Not only is the request for mandamus relief in respect to petitioner's right to his office perfectly proper, *Marbury v. Madison*, *supra*, but it is amply clear that relief against the non-legislative officers and employees of the House, the Sergeant-at-Arms, the Clerk and the Doorkeeper is wholly available, *Kilbourne v. Thompson*, *supra*, (relief allowed against Sergeant-at-Arms), *Dombrowski v. Eastland*, 387 U.S., (relief allowed against chief counsel of Senate Committee). Furthermore the relief sought in respect to salary owed petitioner is completely proper and within all conventional scope of judicial power, *Bond v. Floyd*, *supra*.

lege has been to protect legislators from punitive retaliatory action. Thus criminal or civil sanctions of a deterrent nature have been barred by the clause where they arise as an effort to intimidate legislators engaged in "legitimate legislative activity." *Kilbourne v. Thompson*, 103 U.S. 168, *Tenney v. Brandhove*, 341 U.S. 367; *United States v. Johnson*, 383 U.S. 169, and *Dombrowski v. Eastland*, 387 U.S. 82. Judicial remedies unrelated to punitive or deterrent sanctions, and designed solely to enforce the historic role of the judicial branch in adjudicating the constitutionality of actions of the legislature, Cf. *Marbury v. Madison*, *supra*, obviously do not fall within the preventative scope of the clause. In any event the immunity of the clause attaches solely to "legitimate legislative activity," *Tenney v. Brandhove*, *supra*, and the gravamen of this action is the charge that the conduct of the respondents was wholly without constitutional sanction. Finally, it is of course clear that the immunity of the clause, whatever its scope, does not attach to the Sergeant-at-Arms, the Doorkeeper, the Clerk and other employees of the House. *Kilbourne v. Thompson*, *Dombrowski v. Eastland*, both *supra*.

Conclusion

The judgment below should be reversed and this Court should direct the entry of a judgment embodying appropriate relief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, JR., *et al.*,
Petitioners,

v.

JOHN W. MCCORMACK, *et al.*,
Respondents.

**RESPONDENTS' MEMORANDUM SUGGESTING
THAT THIS ACTION SHOULD BE
DISMISSED AS MOOT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, JR., *et al.*,
Petitioners,

v.

JOHN W. McCORMACK, *et al.*,
Respondents.

**RESPONDENTS' MEMORANDUM SUGGESTING
— THAT THIS ACTION SHOULD BE
DISMISSED AS MOOT**

In our Memorandum in Opposition to the granting of certiorari (pp. 13-15), we pointed out that the issues raised in the Petition might well become moot before they could be fully briefed and considered. Since the granting of certiorari (on November 18, 1968), two events occurred which we suggest have in fact mooted the issues raised in the Petition. Accordingly, we urge this Court to vacate the judgment of the Court of Appeals and remand to the District Court with directions to dismiss on the ground of mootness.

The two subsequent events both occurred on January 3, 1969. First, the House of Representatives of the 90th Congress officially terminated, and a new House, of the

91st Congress, was convened and organized. Second, Mr. Powell presented himself for membership in that new House, having been elected from New York's 18th Congressional District at the general election on November 5, 1968, and he was seated (115 CONG. REC. H22 (daily ed. Jan. 3, 1969)).* The termination of the 90th Congress and the seating of Mr. Powell in the 91st Congress have eliminated whatever controversy was presented by the Petition and have rendered ineffective and unnecessary any order directing that he be seated.

The complaint—the parties, the issues and the relief—is cast exclusively in terms of the House of Representatives of the 90th Congress (Appendix 7-22). Mr. Powell and certain electors of the 18th Congressional District who voted for him at the general election in November 1966 seek to have him seated in the 90th Congress. Petitioners name as defendants (a) six Members of the House of Representatives of the 90th Congress, including the Speaker, who are sued individually and as representatives of the purported class of the entire Membership of that House, and (b) three officers of that House—the Clerk, the Sergeant-at-Arms and the Doorkeeper.

The same is true of the Petition and Brief filed January 6, 1969. The only issues raised in the Petition concern the seating of Mr. Powell in the 90th Congress and claims of the constituents of the 18th Congressional District to have him seated in that Congress. The Brief characterizes the “bedrock constitutional questions raised in this appeal” as the “extraordinary, arbitrary, and unconstitutional

* The resolution seating him also provided as punishment for a fine of \$25,000 and for his seniority to commence as of the date he took the oath of office. H. R. Res. 2, 115 CONG. REC. H 21 (daily ed. Jan. 3, 1969).

action of the majority of the House of Representatives on March 1, 1967, in excluding Adam Clayton Powell, Jr. . . . from membership in the entire 90th Session of the House" (Brief 4). Again and again this 172-page Brief emphasizes petitioners' contention that the House's exclusion of Mr. Powell unconstitutionally deprived his constituents of representation in the 90th Congress. It mentions only in passing the events of January 3, 1969 (Brief 23-23a, 23b note, 156 n.101).

Yet it is precisely those events of January 3, 1969, which have rendered wholly and irretrievably academic the basic issues raised by petitioners in their complaint, Petition and Brief.

First. The primary and principal relief sought in this action is the seating of Mr. Powell in the 90th Congress. But obviously such relief cannot be granted. The 90th Congress is now only history. The present House is not only a different entity at law, *see* U. S. CONST. art. I, § 2, amend. XX, §§ 1, 2; 2 U.S.C. §§ 7, 25, 26 (1964); *Gojack v. United States*, 384 U. S. 702, 706-07 n.4 ("Neither the House of Representatives nor its committees are continuing bodies"); *McGrain v. Daugherty*, 273 U. S. 135, 181; *Marshall v. Gordon*, 243 U. S. 521, 542; *Anderson v. Dunn*, 6 Wheat. 204, 231; it is also a different entity in fact.*

Moreover, the decision of the 91st Congress to seat Mr. Powell has completely eliminated the possibility that the underlying controversy might be revived. This fact alone renders inapplicable recent decisions of this Court declining to dismiss for mootness where the underlying controversy or the events which gave rise to the controversy were

* Forty-one of the present Members of the House were not Members of the 90th Congress. Indeed, two of the Members of the 90th Congress who are specifically named as defendants in this action, Messrs. Moore and Curtis, are not even Members of the present House. *See* N. Y. Times Nov. 8, 1968, at 26, col. 6.

likely to revive or recur in the future or would have future adverse consequences which an adjudication could prevent.* Here, of course, Mr. Powell has taken his seat, and there is no present reason to believe he will not be seated again if reelected.**

But even more significantly, unlike this case, none of those recent cases required this Court to adjudicate delicate constitutional questions—questions this Court has constantly and wisely sought to avoid in advance of compelling necessity even in the absence of a possible confrontation

* See, e.g., *United States v. Concentrated Phosphate Export Ass'n*, 89 S. Ct. 361 (likelihood of further antitrust violations not sufficiently remote to make injunctive relief unnecessary, despite dissolution of association); *Carroll v. President & Commissioners*, 89 S. Ct. 347 (municipality aggravated by petitioners' persistent and continuing acts and program might well again restrain them from exercising their rights of free speech); *Wirtz v. Bottle Blowers Ass'n*, 389 U. S. 463 and *Wirtz v. Local 125, Laborers'*, 389 U. S. 477 (statutory suit to challenge unsupervised union election not mooted by subsequent unsupervised election); *Bank of Marin v. England*, 385 U. S. 99 (petitioner still subject to suit for contribution on same underlying issue); *Carafas v. LaVallee*, 391 U. S. 234, and *Sibron v. New York*, 88 S. Ct. 1889 (disadvantageous collateral consequences from petitioners' state criminal convictions would continue despite their release from prison).

** Without elaboration or analysis, petitioners baldly state in their Brief that the imposition of sanctions against Mr. Powell by the 91st Congress "continues the unconstitutional conduct of the respondent, which is developed in this appeal" (Brief 23a). However, the action taken by the 91st Congress is both legally and factually different from the action of the 90th Congress, *Gojack v. United States*, 384 U. S. at 706 n.4. That action of the latter Congress in no way touches upon the issues raised in this litigation, which arise out of the now mooted refusal to seat Mr. Powell in the 90th Congress.

We note, however, that the recent action of the House constitutes a proper and lawful exercise of its power to "punish its Members for disorderly Behaviour". U. S. CONST. art. I, § 5; *John L. McLaurin and Benjamin R. Tillman (South Carolina)*, SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS, SENATE COMMITTEE ON RULES AND ADMINISTRATION, SENATE ELECTION, EXPULSION AND CENSURE CASES. S. Doc. No. 71, 87th Cong., 2d Sess. 94-97 (1962); 25 CONG. REC. 162 (1893).

between coordinate branches, such as is present here. *Ashwander v. TVA*, 297 U. S. 288, 346-48) (Brandeis, J., concurring).

A precedent with remarkable factual similarity to this action is *Aleandrino v. Quezon*, 271 U. S. 528. There, this Court refused to review a resolution suspending a member of the Philippine Senate because the period of suspension had expired and because the suspended member had resumed his functions as a member. This Court concluded that, "It is therefore . . . a moot question whether lawfully he could be suspended in the way in which he was" and that equally moot was "the still more important question" whether the court had any jurisdiction to compel the Philippine Senate to rescind its resolution and readmit Aleandrino. *Id.* at 532-33. A similar result is even more compelled here, since this Court in this case is asked to take the more drastic step of reviewing the internal action of a coordinate branch founded on powers expressly granted to it by the Constitution, rather than the action of a territorial legislature.

It is no answer that petitioners perhaps now seek only declaratory relief. Passing the point that such relief is requested against officers and agents of a body which no longer exists—the House of Representatives of the 90th Congress, such relief is equally as inappropriate as mandatory relief would be since it is authorized only in "a case of actual controversy", 28 U.S.C. § 2201 (1964). There is no longer any "actual controversy" involving the seating of Mr. Powell.

Second. Any other matters which petitioners may urge remain to be resolved (*e.g.*, questions involving Mr. Powell's claim for \$55,000 back pay and seniority) are wholly incidental and subordinate to his now mooted demand for

seating. As in *Alejandro*, they in no way alter the fact that this action is moot. In that case this Court assumed that Alejandro might have some incidental claim to salary and other emolument if they had been illegally withheld during the period of suspension. But since "the main question as to the validity of the suspension has become moot," this Court concluded that "the incidental issue" of Alejandro's claimed salary was "not in itself a proper subject for determination as now presented" 271 U. S. at 535. The reasons assigned for that conclusion apply equally here.*

Furthermore, any claim that Mr. Powell may have for lost salary cannot properly be asserted in this proceeding. Such a claim lies, if at all, against the United States, not against the Members of the House of Representatives of the 90th Congress. Moreover, exclusive jurisdiction over Mr. Powell's salary claim is vested in the Court of Claims. See 28 U.S.C. §§ 1346(a)(2), 1491 (1964); *Wilson v. United States*, 44 Ct. Cl. 428 (1909).

If Mr. Powell should choose to pursue his salary claim, there are additional reasons which make it particularly appropriate for him to proceed in the proper forum, the Court of Claims. Such a proceeding in the Court of Claims would be against the United States, not the House of Rep-

* *Bond v. Floyd*, 385 U. S. 116, is not to the contrary. In answer to the question raised in oral argument as to whether that case was moot since the session of the Georgia House which excluded Bond was no longer in existence, this Court said: "The State has not pressed this argument, and it could not do so, because the State has stipulated that if Bond succeeds on this appeal he will receive back salary for the term from which he was excluded." *Id.* at 128 n.4. There is no such stipulation here, nor could there be. Also, the term from which Bond was excluded did not end until December 31, 1966, and accordingly had not expired when this Court decided the case on December 5, 1966. Finally, Bond had not been seated at the time of this Court's decision, and there was a substantial likelihood that the exclusionary acts complained of would be repeated.

representatives. Indeed, it might be possible to resolve the claim under the applicable statutory law without reaching the constitutional questions. *See, e.g.*, 2 U.S.C. §§ 31, 34, 35, 37, 39, 40 (1964). Moreover, the United States as a party to such a proceeding could counterclaim or assert a set-off of whatever money Mr. Powell may owe it.**

Similarly, any claim which Mr. Powell might make for seniority cannot in any way affect the mootness of this action. Seniority, of course, is not mentioned in the Constitution, and indeed the Constitution expressly authorizes each house of Congress to "determine the Rules of its Proceedings". U.S. CONST. art. I, § 5. Whatever influence and authority flow from seniority are, therefore, matters the Members of the House and the party caucuses must determine for themselves. Although respect for seniority is conventional, it is not required by the rules of the House and has been taken away from other Members. For example, Representative (now Governor) John Bell Williams of Mississippi was recently deprived of his seniority on the apparent ground that he supported a Republican candidate for President (CONGRESSIONAL QUARTERLY, Jan. 6, 1967, at 25); and at least three other Representatives have had their seniority removed (CONGRESSIONAL QUARTERLY, Jan. 13, 1967, at 48). Yet claims to restore seniority have never been deemed an appropriate subject of judicial intervention because, as Judge Leventhal noted in the court below,

"... a court would be going to the extreme edge of its authority if it were to declare his status as a Congressman. It cannot reasonably be asked to provide such extraordinary relief to enable complainant to

** In a letter to the Hon. Emanuel Celler, dated January 2, 1969, the Attorney General stated that the Department of Justice is continuing to study whether Mr. Powell is civilly liable for misconduct in office. *See* 115 CONG. REC. H5 (daily ed. Jan. 3, 1969).

obtain perquisites, however important, that are essentially a matter for legislative determination) and certainly are not assured by any constitutional clause. A court has a duty, in the sound exercise of discretion, to consider litigation seeking relief that raises problems of confrontation with a coordinate branch with an approach that will, wherever possible, confine relief narrowly." (Appendix 98.)

Finally, all the so-called privileges and emoluments of office as a Member of the 90th Congress which Mr. Powell may contend he lost as a result of his exclusion might well not have been lost if he had presented himself for membership in that Congress after he was elected in a special election in April 1967 to fill the vacancy created by his exclusion. As Mr. Powell knew, the Speaker on two separate occasions carefully reserved for future consideration by the House the right to make a new determination if Mr. Powell were again elected and were to present himself. *See* 113 CONG. REC. H1942 (daily ed. Mar. 1, 1967); 113 CONG. REC. H4869 (daily ed. May 1, 1967). Nevertheless, Mr. Powell chose never to reappear in the House of the 90th Congress after his reelection in April.

CONCLUSION

This case no longer involves a controversy between Mr. Powell and the House over his right to a seat or the right of his constituents to have him seated. Mr. Powell is now sitting in the House. This action, therefore, lacks those elements of a live case or controversy which are necessary to make it an appropriate framework for considering the delicate constitutional issues which petitioners tender—issues which involve the possibility of confrontation between coordinate branches of the Government. Under these circumstances, this case should be governed by the salutary

principle that this Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it", *Ashwander v. TVA*, 297 U.S. 288, 346-47 (Brandeis, J., concurring), or "entertain constitutional questions in advance of the strictest necessity", *Parker v. County of Los Angeles*, 338 U.S. 327, 333. Time and again this Court, abiding by this principle, has avoided constitutional adjudication where the circumstances were not compelling. See, e.g., *Poe v. Ullman*, 367 U.S. 497; *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237; *Rescue Army v. Municipal Court*, 331 U.S. 549; *United Public Workers v. Mitchell*, 330 U.S. 75. This is such a case.

WHEREFORE, it is respectfully suggested that the judgment of the Court of Appeals should be vacated and the case remanded to the District Court with directions to dismiss on the ground that the case is now moot.

January 10, 1969

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, JR., ET AL.,
Petitioners,

v.

JOHN W. MCCORMACK, ET AL.,
Respondents.

**MOTION FOR LEAVE TO FILE AND BRIEF OF
GEORGE MEADER, AMICUS CURIAE,
IN SUPPORT OF RESPONDENTS**

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February 4, 1969

IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, JR., ET AL.,
Petitioners,

v.

JOHN W. MCCORMACK, ET. AL.,
Respondents.

**MOTION FOR LEAVE TO FILE BRIEF OF
GEORGE MEADER, AMICUS CURIAE,
IN SUPPORT OF RESPONDENTS**

MAY IT PLEASE THE COURT:

The undersigned, George Meader, respectfully moves this honorable court for leave to file the annexed brief *amicus curiae* in this case in support of Respondents.

1. Applicant served as a member of the U. S. House of Representatives from the Second Congressional District of Michigan between 1951 and 1965, and in the Eighty-third and 86th-88th Congresses was a member of the Judiciary Committee of the House of Representatives. Prior to such Congressional service, applicant served for approximately four years, commencing in July of 1943, as Assistant Counsel and then Chief Counsel of the United States Senate Spe-

cial Committee Investigating the National Defense Program, popularly known as the Truman Committee. In 1950, Applicant served as Chief Counsel of the United States Senate Banking and Currency Subcommittee Investigating RFC Loans, popularly known as the Fulbright Committee. Subsequent to congressional service, Applicant served as Associate Counsel and then Chief Counsel of the Joint Committee on the Organization of the Congress between March of 1965 and August of 1968. Among the subjects committed to the Joint Committee on the Organization of Congress for study was relations between the judicial and legislative branches of the government. Applicant has followed with great interest the developments in this case from its beginning to the present time.

2. Applicant believes there are necessarily involved in this case certain historic but delicate constitutional issues which the Court should consider. These issues are:

- a. Is this an appropriate class action?
- b. May 434 members of the House of Representatives be bound when only 6 members have been served?
- c. Is this attempted class action in effect a suit against the House of Representatives as a legislative body?
- d. Is the House of Representatives a "person" or "party" that may be brought before the Court as a defendant in a suit?
- e. If the House of Representatives is a person which can be made a party, is it clothed with the sovereign immunity of the United States Government?
- f. If it is so clothed, has that sovereign immunity ever been effectively waived?
- g. Whether the suit is treated as one against the House of Representatives as a legislative body or as against all of its members as individuals, does the Court have any effective sanction for enforcing its decree in the light of the "freedom from arrest" clause of the Constitution?

3. Applicant believes the foregoing issues will not be adequately presented by the parties in this case because these issues were not adequately presented in the briefs before the United States Court of Appeals. Furthermore, Petitioners' brief in this Court does not adequately present these issues.

4. Even though Respondents may prevail on some other grounds, failure of the Court to comment on the issues raised above may be a precedent that the House of Representatives can be sued by a citizen, or citizens, through the device of a class suit. At the minimum, in the event the Court does uphold Judge Hart's dismissal of the above action, on grounds other than those enumerated above, the Court could appropriately include in its opinion a statement to the effect that, having disposed of the case on other grounds, the Court did not find it necessary to consider and reach a decision on the issues raised above.

5. Applicant has requested consent to file a brief *amicus curiae* from the parties to this case under Rule 42 of the Rules of this Court, but has not yet received from either party the written consent requested.

6. It is respectfully submitted that this case affords an appropriate occasion for the Court to grant leave to file the brief annexed hereto.

I therefore urge that leave be granted, and respectfully so move the Court.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. 138

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**BRIEF OF GEORGE MEADER, AMICUS CURIAE,
IN SUPPORT OF RESPONDENTS**

FACTS

✓
Petitioners commenced this action in the United States District Court for the District of Columbia under Rule 23a of the Rules of Civil Procedure against the Speaker and five other members of the House of Representatives of the 90th Congress, individually, and "as representatives of a class of citizens who are presently serving in the 90th Congress as members of the House of Representatives," and also against three officers of the House of Representatives.

The Petitioners sought a temporary and permanent injunction restraining Respondents from enforcing and operating under House Resolution 278, Adopted March 1, 1967,

excluding Representative-elect Adam Clayton Powell from the 90th Congress.

Attorney Bruce Bromley, after appearing specially on behalf of Respondents, moved to dismiss the action on the grounds that the Court did not have jurisdiction over the persons or the subject matter of the suit.

District Judge Hart dismissed the suit "for want of jurisdiction of the subject matter," basing his decision on the doctrine of separation of powers between the judicial and legislative branches of the government.

The Circuit Court of Appeals for the District of Columbia affirmed Judge Hart's order dismissing the suit but in their opinions held that they did have jurisdiction over the defendants and the cause was justiciable but in their discretion they decided it was inappropriate to exercise their jurisdiction.

QUESTION

May Petitioners, either individually, or as representatives of a class, maintain an action in a United States District Court against Respondents, either as individuals in their legislative capacity or as representatives of a class consisting of all members of the House of Representatives of the 90th Congress, or against the U. S. House of Representatives itself as a legislative body?

ARGUMENT

Introduction

Although the undersigned has views on the decision of the House of Representatives in House Resolution 278, and on the power of the House of Representatives to judge the qualifications of its members; and the extent of that power, and other issues such as justiciability, the extent of federal court jurisdiction over cases arising under the laws or Constitution of the United States, the speech and debate clause and immunity rising therefrom, and the political-question issue; none of these matters will be discussed in

Applicant's brief because the Applicant desires to focus attention upon the propriety of the procedure in this suit, namely, whether or not the device of a class action under Rule 23 of the Rules of Civil Procedure is available for a citizen to commence an action against the House of Representatives of the United States Congress.

I

This Is Not An Appropriate Class Action.

In determining whether all members of the House of Representatives of the 90th Congress are a "class," so that they may be effectively joined as defendants through the service of process on six members as representatives of that class, the following considerations are relevant:

1. Each individual member is the representative of his own constituency and no two constituencies are the same.
2. Each member must cast his own vote and may not transfer the right to his vote to any other member or person.
3. A seat in Congress, unlike a share of stock, cannot be sold or transferred.
4. To bind member A, who was not served or represented in the instant case, by a decree against member B, who was served and appeared by counsel, would deny due process to A and to the constituents he represents.
5. It is the very essence of a legislative body to hold and advance differing points of view. Indeed, the debate on H. Res. 278 (March 1, 1967), as well as the debate on H. Res. 376 (March 9, 1967) authorizing the Speaker to employ counsel, are evidence of widely differing views of members—not only on the seating of Powell—but even on the manner in which the suit against some members and officers of the House should be defended.
6. Some members of the House of Representatives are Republicans, other are Democrats, some voted in favor of Powell at various stages in the proceedings of March 1, 1967, other voted against him.

7. It is difficult to see how any small group of members such as the six served in the *Powell* case can appropriately "represent" other members who were not served. It is difficult to conceive, for instance, that Representative Celler, who is a named defendant, could represent Representative H. R. Gross of Iowa.

8. 428 elected members of the House of Representatives are not "too numerous" to be brought before the Court as defendants when the purpose of the action is to bind them individually in the exercise of their legislative discretion.

9. Under Rule 23c of the Rules of Federal Civil Procedure, defendants sought to be joined as a class, but not served with process, are entitled to notice, and have the option of being excluded or entering an appearance through their own counsel. The pertinent provisions are as follows:

"(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED: NOTICE: JUDGMENT: ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. . . ."

10. Even if all 434 members, individually, could be joined as defendants in a class action, as individuals, this still would not reach the result requested by Petitioners. Even if each of the 434 members should individually, or with co-sponsorship in groups of twenty-five, introduce resolutions in accordance with the requests of Petitioners, still no action would occur officially by the House of Representatives until all of the procedures under the Rules and precedents of the House had been undertaken to validly adopt a resolution of the House of Representatives. The only meaningful relief the Court could grant would be against the House of Representatives as a legislative body, not against its entire membership as individual representatives.

II

The House of Representatives Is Not A "Person" Capable of Being Made A Party Defendant In A Suit In The U. S. District Court.

A. The House of Representatives is not a "person," natural or artificial. It owes whatever corporate existence it has to the Constitution of the United States, which defines its organization and its powers.

The House of Representatives is one branch of the Congress of the United States and has only the attributes described in the Constitution. Nowhere in the Constitution is the Congress as a whole, or the Senate or the House of Representatives as its branches, given the power to sue or be sued.

Whether the Congress through the exercise of its legislative power could vest in itself or in either or both of its branches the power to sue or be sued would be, for the purposes of this action, idle speculation, because the Congress has never passed such a law.

In the history of our republic, this is the first case ever to reach the Supreme Court in which plaintiffs have sought to make the House of Representatives or the Sen-

ate or the Congress as a whole a party defendant in the federal courts. This historical fact is persuasive in itself that the House of Representatives as a legislative body may not be brought before the federal courts.

B. Even if the House of Representatives is a "person" with the capacity to be made a party defendant in an action, it is clothed with the sovereign immunity of the United States Government which would successfully prevent maintaining an action against it without its consent. Petitioners can cite no law waiving this sovereign immunity of the House of Representatives nor action by the House of Representatives, itself, consenting to be sued.

III

Whether the Suit Is Treated as One Against the House of Representatives as A Legislative Body or as Against All of Its Members as Individuals, the Courts Do Not Have Any Effective Sanction for Enforcing A Decree In the Light of the "Freedom From Arrest" Clause of the Constitution.

ARTICLE I, Sec. 6, Clause 2, of the United States Constitution provides as follows with respect to Senators and Representatives:

"They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same;"

A decree granting the affirmative relief prayed by Petitioners would be enforceable through contempt proceedings and imprisonment of Respondents. Such enforcement sanction against respondents would be unavailable by reason of the "freedom from arrest" clause quoted above.

If the "freedom from arrest" clause is not a bar to imprisonment for contempt, the legislative process would come to a halt.

CONCLUSION

It is respectfully suggested that the judgment of the Court of Appeals should be vacated and the case remanded to the District Court with directions to dismiss the complaint on the grounds that it does not present an appropriate class action under Rule 23 of the Civil Rules of Procedure; that the House of Representatives as a legislative body may not be made a party defendant in a suit in the United States District Court and that the Court is without power to enter an enforceable decree because of the "freedom from arrest" clause of the United States Constitution.

In the event the relief suggested above is granted by the Court, but on other grounds, it is respectfully suggested that the Court include in its opinion a statement to the effect that because of its disposition of the case on other grounds, the Court did not find it necessary to reach and pass upon the issues raised in this brief.

Respectfully submitted,

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MAY 17 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 138

ADAM CLAYTON POWELL, JR., et al.,
Petitioners,

v.

JOHN W. MCCORMACK, et al.,
Respondents.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE
Supreme Court of the United States

October Term, 1968

No. 138 /

ADAM CLAYTON POWELL, JR., *et al.*,
Petitioners,

v.

JOHN W. McCORMACK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

**Constitutional and Statutory
Provisions Involved**

This case involves the following constitutional and statutory provisions, the texts of which are set forth in Appendix A to this brief:

United States Constitution:

Article I, section 1;
Article I, section 2, clauses 1, 2 and 5;
Article I, section 3, clauses 3, 5-7;
Article I, section 5;
Article I, section 6;
Article I, section 9, clause 3;
Article III, section 1;
Article III, section 2;

Article IV, section 4;

Article VI, clauses 2 and 3;

Amendment V;

Amendment XIII;

Amendment XIV, sections 1, 3 and 5;

Amendment XV;

Amendment XX, sections 1 and 2.

Act of March 3, 1875, ch. 137 [§ 1], 18 Stat. 470;

Force Act, ch. 114, § 23, 16 Stat. 146 (1870);

Legislative Branch Appropriation Act, 1967, P.L. 89-545, 80 Stat. 354;

Legislative Branch Appropriation Act, 1968, P.L. 90-57, 81 Stat. 127;

Legislative Branch Appropriation Act, 1969, P.L. 90-417, 82 Stat. 398;

2 U.S.C. §§ 25, 31, 34, 35, 78, 80, 83 (1964);

28 U.S.C. §§ 1331(a), 1344, 1361, 1491, 2201-02, 2282 (1964);

31 U.S.C. § 671 (1964);

Federal Rules of Civil Procedure 19(a), 23(a)-(c).

Questions Presented

1. Whether, in a suit against Members and certain agents of the United States House of Representatives, any court may review the House's exclusion of a Member-elect pursuant to its constitutional powers to judge the qualifications of its Members and to expel a Member.

2. Assuming arguendo that any court may review such an action, whether the complaint states a claim where the action of the House (a) was based upon the unchallenged

findings that the Member-elect had been found in contempt of the processes and authority of state courts and, in his capacity as a Member of the preceding House, had wrongfully and wilfully misappropriated public funds; (b) was authorized by a vote of more than two-thirds; and (c) did not infringe any provision of the Constitution.

3. Again assuming *arguendo* that any court may review such an action; whether dismissal of the complaint seeking the extraordinary relief of ordering the House to reverse its judgment excluding the Member-elect was a proper exercise of discretion where that Member-elect (a) has not challenged the factual basis for the House's judgment; (b) did not present himself for admission after re-election at a special election; and (c) refused to cooperate with a committee of the House authorized to inquire into his conduct.

4. Again assuming *arguendo* that any court may review such an action, whether the suit should in any event be dismissed as moot where (a) the House of Representatives of the Congress from which the Member-elect was excluded is no longer in existence; and (b) the Member-elect was elected to and is now seated in the House of the succeeding Congress.

Counterstatement of the Case

This is an appeal from the Court of Appeals' affirmance of the District Court's dismissal of an action seeking declaratory, mandatory and injunctive relief against the House of Representatives of the 90th Congress and certain of its officers. The action was brought by Adam Clayton Powell, Jr., and thirteen electors of the 18th Congressional District of New York. The complaint presents for the first

time in our nation's history, a suit against a house of Congress challenging its action in excluding or expelling a member-elect. No matter how diplomatically petitioners cast their plea, the complaint seeks nothing less than a direct confrontation between the Court and the House with all the profound and disturbing implications that such a confrontation would entail.* As petitioners' counsel candidly admitted to the District Court, "Here we are suing the Legislative branch." Transcript of Proceedings before the District Court, April 4, 1967, at 204.

The Parties

In addition to Mr. Powell, petitioners are thirteen "non-white citizens of the United States and duly qualified electors of the 18th Congressional District of the state of New York . . . [who] upon information and belief voted at the general election of 1966 for plaintiff, Adam Clayton Powell, Jr." (A. 9). Petitioners purport to sue on their own behalf and "on behalf of all other persons similarly situated, pursuant to Rule 23(a). . ." (A. 8-9). Some, but not all, of the prerequisites for a class action are alleged. See Fed. R. Civ. P. 23(a)-(c).

Respondents McCormack and five other Members of the House are sued individually and, purportedly, "as representatives of a class of citizens who are presently serving in the 90th Congress as members of the House of Representatives" (A. 10). Speaker McCormack is also

* Among other things, the complaint sought an order restraining the Members of the House "from taking any action to enforce House Resolution No. 278 or any other action which will deny to plaintiff Adam Clayton Powell, Jr., the right to be seated. . . ." (A.19) (emphasis added). [References to the record contained in the Appendix filed under Rule 36 are designated "A."]. Such an order is tantamount to directing Members of the House as to how they must vote or refrain from voting in all matters pertaining to the seating of Mr. Powell.

sued as Speaker of that House. None of the Rule 23 prerequisites of a class action is alleged with respect to the asserted class of respondents (A. 9-10).*

Respondents Jennings, Johnson and Miller—respectively the Clerk, the Sergeant-at-Arms and the Doorkeeper of the House of Representatives of the 90th Congress—are sued both individually and in their respective capacities as agents of that House (A. 10).

Proceedings in the House

During the fall of 1966, the Committee on House Administration conducted hearings with respect to alleged misuse of congressional funds and privileges by Mr. Powell and by the Committee on Education and Labor, of which he was Chairman. See H.R. REP. No. 2349, 89th Cong., 2d Sess. (1967). Mr. Powell was invited to testify, but did not appear. *Id.* at 5. The Committee concluded that Mr. Powell had violated House rules regarding the hiring of clerks and the use of House air travel credit cards. *Id.* at 6-7.

On January 9, 1967, the Democratic caucus voted to cause the removal of Mr. Powell as Chairman of the House Education and Labor Committee. CONG. Q., Jan. 13, 1967, at 48-49.

When the 90th Congress first assembled on January 10, 1967, Mr. Powell was asked to step aside during the ad-

* If we are correct that the central problem here involves the voting power of each Member of the House, we believe that no Member of the House can adequately represent any other Member. Each Member's vote is his alone to cast and to defend. In our view, therefore, a class action is inappropriate and each Member of the House of the 90th Congress was an indispensable party to the action under Federal Rule of Civil Procedure 19(a). Those issues may be passed for the present, however, because we believe that the more fundamental question is whether the House or its Members as such can ever be sued.

ministration of the oath. 113 CONG. REC. H4 (daily ed. Jan. 10, 1967).

Two resolutions were then proposed and debated, with regard to his seating. *Id.* at H4, H14-16. Mr. Powell participated in that debate. *Id.* at H13.

During the debate on those resolutions, the conclusions of the Committee on House Administration were adverted to as one ground for an inquiry into what action the House should take with respect to Mr. Powell, *id.* at H5, H7, H9, H14, while another ground mentioned was Mr. Powell's contumacious attitude toward the New York courts. *Id.* at H5, H6, H8, H9, H10, H12.

In due course, House Resolution 1 was adopted. *Id.* at H16. That Resolution authorized a Select Committee to investigate and to report promptly the results of its investigation and its recommendations regarding "the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein" H.R. Res. 1, 90th Cong., 1st Sess. 1 (1967) [hereinafter H.R. Res. 1]. During the interim, Mr. Powell was to receive the pay, allowances and emoluments authorized for Members, but he was not to be sworn in or permitted to occupy a seat in the House. *Id.* at 1, 2.

On February 1, the Select Committee, made up of nine lawyers headed by the Chairman of the House Judiciary Committee, invited Mr. Powell to testify on February 8 concerning his age, citizenship, inhabitancy and:

"(1) The status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court;

"(2) Matters of your alleged official misconduct since January 3, 1961." *Hearings Before Select Committee Pursuant to H. Res. 1, 90th Cong., 1st Sess. 2 (1967)* [hereinafter *Hearings Before Select Committee*].*

The Committee advised Mr. Powell that he could be accompanied by counsel and that the hearing would be conducted in accordance with House Rule XI, paragraph 26. *Ibid.*

Prior to the hearings, the scope of the Committee's intended inquiry was discussed at a meeting of counsel for Mr. Powell and for the Committee on February 3. *Id.* at 59; REPORT OF SELECT COMMITTEE 6 n.9. On February 6, counsel for the Committee spelled out further the scope of the inquiry as to "matters of Mr. Powell's alleged official misconduct since January 3, 1961." The Chief Counsel stated by letter that:

"[T]he Select Committee desires to interrogate Mr. Powell . . . [as to] paragraphs 1 to 11 of the 'Conclusions' contained in the Report of the Committee on House Administration, Special Subcommittee on Contracts (pp. 6 and 7) [a copy of which was enclosed] relating to an investigation into expenditures during the 89th Congress by the House Committee on Education and Labor and the clerk-hire status of Y. Marjorie Flores (Mrs. Adam C. Powell)." *Hearings Before Select Committee* 59.

On February 8, Mr. Powell, accompanied by seven attorneys, appeared at the first hearing. *Id.* at 1. At the out-

*The date of January 3, 1961, was chosen because on that date (the commencement of the 87th Congress) Mr. Powell became Chairman of the Committee on Education and Labor. SELECT COMMITTEE PURSUANT TO H. RES. 1, REPORT, 90th Cong., 1st Sess. 6 n.8 (1967) [hereinafter REPORT OF SELECT COMMITTEE].

set, Chairman Celler, without objection or comment by Mr. Powell or his attorneys, took official notice of the hearings and report of the Committee on House Administration, which included extensive conclusions regarding Mr. Powell's misuse of House funds and violation of Public Law 89-90 governing hire of clerks. *Id.* at 30.

Chairman Celler than recited the procedure governing the hearing:

- (1) Mr. Powell could be accompanied by counsel;
- (2) House Rule XI, paragraph 26, would apply;
- (3) counsel for Mr. Powell could present oral argument to the Committee; and
- (4) Mr. Powell could make a statement to the Committee on all matters contained in the letter of invitation to him to testify. *Id.* at 30.

Finally, Chairman Celler emphasized that the House, rather than the Committee, was the judge of Mr. Powell's qualifications. *Ibid.*

Counsel for Mr. Powell promptly moved, by brief and argument: that the Committee limit its inquiry to Mr. Powell's age, citizenship and inhabitancy; that it immediately terminate its proceedings and report that Mr. Powell was qualified; and that it grant Mr. Powell certain procedural rights.* *Id.* at 7-25, 31-54. The Committee

* The rights requested were: (1) "fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser"; (2) "the right to confront his accuser, and in particular to attend in person and by counsel all sessions of this committee at which testimony or evidence is taken, and to participate therein with full rights of cross-examination"; (3) "the right fully in every respect to open and public hearings in every respect in the proceedings before the select committee"; (4) "The right to have this committee

denied Mr. Powell's substantive motions, and with respect to his motion for certain procedural rights, Chairman Celler stated:

"This is not an adversary proceeding. The committee is going to make every effort that a fair hearing will be afforded, and prior to this date has decided to give the Member-elect rights beyond those afforded an ordinary witness under the House rules.

"The committee has put the Member-elect on notice of the matters into which it will inquire by its notice of the scope of inquiry and its invitation to appear, as well as by conferences with, and a letter from its chief counsel to the counsel for the Member-elect.

"Prior to this hearing the committee decided that it would allow the Member-elect the right to an open and public hearing, and the right to a transcript of every hearing at which testimony is adduced.

"The committee has decided to summon any witnesses having substantial relevant testimony to the inquiry upon the written request of the Member-elect or his counsel.

"The Member-elect certainly has the right to attend all hearings at which testimony is adduced and to have counsel present at those hearings.

"In all other respects, the motion is denied." *Id.* at 59.

Counsel for Mr. Powell excepted to the rulings. *Id.* at 60.

Mr. Powell then testified regarding his citizenship, inhabitancy and age, but refused to answer questions relating

issue its process to summon witnesses whom he may use in his defense"; and (5) "the right to a transcript of every hearing". *Hearings Before Select Committee* 54.

to the other matters specified in the conclusions of the Committee on House Administration, in the debates on House Resolution 1, in the Committee's letter of February 1 and in the Committee's letter of February 6, on the *sole* ground that those matters were not within the constitutionally permissible scope of the Committee's inquiry. *Id.* at 64. At the end of the hearing of February 8, Mr. Powell asked to make a statement. Chairman Celler, denying the request at that time, invited Mr. Powell and his counsel to renew that request subsequently. *Id.* at 107. Mr. Powell never availed himself of that opportunity and did not even attend the remaining hearings.

In a letter to Mr. Powell on February 10, the Committee informed him that the next hearing would be on February 14 and invited him again to testify as to the matters referred to in the Committee's letter of February 6. *Id.* at 110. The Committee advised him that "upon the written request of you or your counsel, Select Committee will summon any witnesses having substantial relevant testimony to the inquiry being conducted by the Committee". *Ibid.* That letter also reconfirmed that Mr. Powell would be given the opportunity at the next hearing to make a statement relevant to the subject matter of the inquiry. *Ibid.*

It also stated that the five motions made at the February 8 hearing had been denied, but that decision on his motion as to whether age, inhabitancy and citizenship were the exclusive qualifications had been reserved. *Ibid.* Mr. Powell was cautioned that, whatever the Committee's decision on the last motion, it had authority, by virtue of House Resolution 1, to inquire into whether Mr. Powell should be punished or expelled as well. The Committee asked Mr. Powell to state whether he would refuse to give any testimony

concerning the status of legal proceedings to which he was a party and his alleged official misconduct since January 3, 1961, in connection with its inquiry with respect to either (a) seating or (b) punishing or expelling. *Ibid.*

On February 11, Committee Counsel wrote to counsel for Mr. Powell, enclosing copies of the Committee's letters of February 6 and 10. Committee Counsel stated that the court reporter would furnish them with a copy of the transcript of the February 8 hearing as soon as one was available. The letter also advised that subpoenas had been issued for Corrine Huff and Y. Marjorie Flores (Mrs. Adam Clayton Powell) and that if they appeared they would be questioned regarding matters referred to in paragraphs 5, 10 and 11 of the conclusions in the report of the Committee on House Administration. *Id.* at 111.

The next hearing of the Committee was on February 14. Mr. Powell did not attend, but his attorneys did. *Id.* at 109. At the opening of the hearing, counsel for Mr. Powell stated that he would refuse to testify with respect to the litigation to which he was a party and the alleged official misconduct, either in the seating phase or the punishing or expelling phase of the Committee's inquiry. *Id.* at 111-13. The Committee then heard, without objection of any kind, evidence with respect to the litigation involving Mr. Powell (*id.* at 113-72) and evidence with respect to the air travel, expense reimbursement, and bank accounts of Mr. Powell and his associates (*id.* at 172-202).

The final hearing of the Committee was on February 16. Neither Mr. Powell nor his attorneys attended. The Committee received testimony from Mrs. Adam Clayton Powell with respect to her financial affairs and those of her husband. *Id.* at 203-38. The Committee also heard testimony from a former assistant to Mr. Powell with respect to dis-

bursements for airplane travel. *Id.* at 238-54. The hearings were then closed.

At no time during the course of the hearings did Mr. Powell or his attorneys indicate in any way a desire to contest any of the factual allegations made against him. He did not renew his request for cross examination with respect to any specific witness. He did not ask the Committee to call any witness on his behalf although the Committee had expressly offered to do so. REPORT OF SELECT COMMITTEE 6. Moreover, he did not attempt to offer any evidence of any kind on these issues.

After the close of the hearings, counsel for Mr. Powell submitted another brief in support of his motions. *Id.* at 255-66. It reiterated that the Select Committee was bound to limit its inquiry to whether his election had been validated and whether he possessed what he considered to be the sole constitutional requirements for membership and stated that, "[f]or that reason, *and for that reason only*, counsel had advised Mr. Powell . . . not to participate in the hearings of the Committee which extend beyond such limitations." *Id.* at 255 (emphasis added).

On February 23, the Committee filed its report. 113 CONG. REC. H1737 (daily ed. Feb. 23, 1967). The Committee found that Mr. Powell was over 25, an inhabitant of New York and a citizen for more than seven years. The Committee also found that Mr. Powell had contemptuously ignored the processes and authority of the New York courts, had wrongfully and wilfully misappropriated public funds, had made false reports on expenditures of foreign exchange currency to the Committee on House Administration, and had been contemptuous of the House in refusing to cooperate with its committees. REPORT OF SELECT COMMITTEE 31-32. Upon those findings, the Committee recom-

mended seating, censure and a fine, his seating to be contingent on Mr. Powell's acceptance of the other conditions. *Id.* at 33.

The next day a notice that the Report would be considered by the House on March 1 was published. 113 CONG. REC. D108 (daily ed. Feb. 24, 1967).

In accordance with that notice, the House debated the Committee's Report and proposed Resolution on March 1, 1967. 113 CONG. REC. H1918-54 (daily ed. Mar. 1, 1967). Mr. Powell was not present in the House—although he could have participated in the proceedings. DESCHLER, RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 374, 88th Cong., 2d Sess. §65 (1965) [hereinafter DESCHLER]. Mr. Fulton of Pennsylvania stated, "I had hoped against hope that ADAM POWELL in the interest of his friends in this House, would appear today, to reason and to adjust, to make amends, to be heard on the past and for future plans", 113 CONG. REC. H1937 (daily ed. Mar. 1, 1967). After extended debate, during which the substantive constitutional issue—whether age, inhabitancy and citizenship are the exclusive qualifications for membership in the House—was extensively discussed, the House, by more than a two-thirds vote (307 to 116), adopted House Resolution 278. *Id.* at H1956-57.

That Resolution adopted the Committee's findings, but rejected the recommended fine and censure and instead excluded Mr. Powell from the House of the 90th Congress.

* On April 11, 1967, while this litigation was pending in the courts, Mr. Powell was re-elected to the House of the 90th Congress. On May 1, that House received a certificate from the New York Secretary of State formally certifying to his election. 113 CONG. REC. H4869 (daily ed. May 1, 1967). However, Mr. Powell never appeared in that House to request that he be given the oath

Court Proceedings

(1) *The District Court.* This action was commenced promptly thereafter, on March 8, 1967. The complaint sought a declaration that House Resolution 278 was unconstitutional and various forms of injunctive and mandatory relief against the Members of the House and its agents.

Very significantly, the complaint did not challenge in any way the accuracy of any of the findings in House Resolution 278.* Petitioners instead contended that the very adoption of the Resolution and the acts taken by the named respondents pursuant thereto violated the Constitution.

Petitioners claimed that the Resolution violated the rights of the electors of the 18th District, under article I, section 2 of the Constitution, to elect a representative of their choice (A. 13).

The Resolution was also alleged, as to all non-white electors of the 18th District, to violate the thirteenth amendment (A. 14); to be a deprivation of equal protection of the laws and due process of law in violation of the

of office. The Speaker had twice made clear that if Mr. Powell should present himself, the House would consider anew whether he should be seated. 113 CONG. REC. H1942 (daily ed. Mar. 1, 1967); 113 CONG. REC. H4869 (daily ed. May 1, 1967).

* Petitioners still do not controvert those findings, although they do point out (Petitioners' Brief 105-06) [hereinafter Br.] that a subsequent grand jury investigation into Mr. Powell's conduct failed to result in an indictment. In a letter dated January 2, 1969, the then Attorney General stated that the grand jury did not return an indictment on recommendation of the Department of Justice which "was based on the conclusion that the available evidence did not warrant prosecution"; however, he went on to state that: "The Department is continuing to study the matter to determine whether there is civil liability." 115 CONG. REC. H5 (daily ed. Jan. 3, 1969).

fifth amendment (A. 14); and, to be an abridgement of their rights to vote in violation of the fifteenth amendment (A. 14).

It is again very significant that, notwithstanding the aforementioned conclusional allegations that Mr. Powell's exclusion deprived non-white electors of the 18th District of their voting rights under the fifth, thirteenth and fifteenth amendments, the complaint did not set forth any facts whatsoever suggesting that Mr. Powell was excluded because of race.

On behalf of Mr. Powell, it was also alleged that House Resolution 278 constituted a bill of attainder (A. 14-15). Finally, it was said that in the hearings before the Select Committee and the debate on the Resolution, Mr. Powell was not accorded "the elemental rights of due process" in violation of the fifth amendment and that "[i]n effect, the whole proceeding amounted to a trial for infamous crimes without presentment or indictment by a Grand Jury" (A. 15).*

Next, petitioners turned to allegations regarding the manner in which certain specific respondents, including non-members of the House, allegedly violated the Constitution. Those alleged violations are presumably claimed to be wrongs as to all petitioners.

Speaker McCormack was alleged to have violated the fifth amendment in declaring the seat of the 18th Congressional District vacant, in notifying the Governor of New York of that vacancy, and "in causing the City of

*The complaint also alleged that the action of the House violated the sixth amendment (A. 5), the prohibition against ex post facto laws (A. 14-15), the prohibition against cruel and unusual punishment (A. 15), and the ninth, tenth, and nineteenth amendments (A. 14, 17). Petitioners have apparently abandoned those contentions in this Court.

New York to undergo the expense of \$100,000 to hold a special election" (A. 15). It was further alleged that Speaker McCormack had wrongfully refused and threatened to continue to refuse to administer the oath to Mr. Powell (A. 16). It was finally alleged that Speaker McCormack wrongfully threatened to exclude Mr. Powell from occupying his office in the House Office Building and to deprive him of the emoluments and privileges of office (A. 16).

Certain charges were also made against the Clerk, the Sergeant-at-Arms and the Doorkeeper, who as officers of the House had the responsibility to implement House Resolution 278. Those officers were alleged to have violated the Constitution and laws of the United States by respectively refusing to perform services and duties for Mr. Powell, refusing to pay Mr. Powell's salary and refusing to admit Mr. Powell to the floor of the House as the duly elected representative of the 18th Congressional District (A. 16-17).

Petitioners sought by injunction, mandamus or declaratory judgment to prevent respondents "from taking any action to enforce House Resolution No. 278 or any other action which will deny to plaintiff Adam Clayton Powell, Jr. the right to be seated . . ." (A. 19) and to compel respondents to seat Mr. Powell and to accord him the privileges and emoluments of office. Such an order would forbid the Members of the House from voting, or direct them to vote, in a particular way on matters relating to the seating of Mr. Powell (A. 18-21).

The District Court, on April 7, entered an order dismissing the complaint for lack of subject-matter jurisdiction (A. 36). The Court also denied petitioners' request to convene a three-judge court and their motion for a preliminary injunction (A. 36).

(2) *The Court of Appeals.* On the same day, petitioners filed a notice of appeal (A. 37), and on April 10, they moved for summary reversal (A. 38). After hearing oral argument, the Court of Appeals denied that motion on April 27 (A. 39). On May 13, petitioners filed in this Court a petition for a writ of certiorari prior to judgment in the Court of Appeals, which was denied on May 29, 387 U.S. 933.

On February 27, 1968, the Court of Appeals entered a judgment unanimously affirming the District Court's dismissal of the complaint (A. 104). The court held that there was subject-matter jurisdiction (A. 58-65, 93, 95), but that the case was not appropriate for judicial consideration for a variety of reasons. Judges Burger and McGowan held that the case presented a nonjusticiable political question (A. 66-78, 92-93 n.3), while Judge Leventhal found it unnecessary to reach the point (A. 95). Judges Burger and Leventhal recognized, without deciding, that the Speech or Debate Clause was an additional bar to the maintenance of this action (A. 79-84, 96), while Judge McGowan did not pass on the question (A. 91 n. 1). Finally, the court, recognizing that the relief requested was in any event discretionary, concluded that it was not an abuse of discretion for the District Court to decline to proceed (A. 74-76, 93-94 n.4, 95).

Events Subsequent to This Court's Granting of Certiorari

On November 18, 1968, this Court granted petitioners' petition for certiorari, which was filed on May 28, 1968, the 90th day following the entry of the judgment of the Court of Appeals. Respondents had opposed the granting of certiorari on the ground, among others, that in view of the then imminent adjournment of the 90th Congress, the issues raised in the petition might well become moot before

they could be fully briefed and considered. Memorandum in Opposition 13-15.

Since the granting of certiorari, two significant events have occurred. On January 3, 1969, the House of Representatives of the 90th Congress, against whom this action was brought, officially terminated, and a new House, of the 91st Congress, was convened and organized. Also on that day, Mr. Powell presented himself for membership in the 91st Congress and was seated. 115 CONG. REC. H22 (daily ed. Jan. 3, 1969).^{*} In view of these events, respondents filed their memorandum suggesting that this action should be dismissed as moot [hereinafter Respondents' Memorandum on Mootness]. On January 27, 1969, this Court postponed further consideration of this suggestion of mootness until argument of the case on the merits.

Summary of Argument

Separation of powers among the judicial, legislative and executive branches is the basis of our federal government. The proper and legitimate functioning of that government requires that each house of the legislative branch be free from interference by the other branches in the governance of its internal affairs. That freedom was wrung by historic struggle from the Tudor and Stuart monarchs and their courts and is encapsulated with this historic gloss in our Constitution, where it now is safeguarded by the Speech or Debate, Power to Judge Qualifications, Power to Punish and Expel, and Freedom from Arrest Clauses of article I.

^{*} The resolution seating him also provided as punishment for a fine of \$25,000 and for his seniority to commence as of the day he took the oath of office. It did not, however, make his seating conditional on either of those matters. See H.R. Res. 2, 115 Cong. Rec. H21 (daily ed. Jan. 3, 1969).

Numerous authorities make clear that those specific constitutional provisions and the historic principles they embody require dismissal of this action and foreclose any judicial inquiry into the decision of the House to exclude Mr. Powell. The House of Representatives is part of an equal and coordinate branch. The decisions it makes pursuant to its exclusive power under article I, whether right or wrong, must command the same respect from the other branches as do the decisions of this Court acting within the scope of its powers under article III. In short, the propriety of what the House did in this case was for the House, and the House alone, to decide.

I. We submit, therefore, that both courts below properly refused to entertain this action:

First. Article I, section 6, clause 1 of the Constitution, the Speech or Debate Clause, bars any court from questioning Members of the House of Representatives with respect to actions taken by them in connection with legitimate legislative activities such as exercise of their constitutional power to judge the qualifications of a Member-elect or to punish or expel a Member. That Clause protects Members both from the consequences of a judgment in any litigation and from the burden of defending themselves in court. *Dombrowski v. Eastland*, 387 U.S. 82. That constitutional immunity, like its English and American colonial precedents, has the broad purpose of protecting the integrity and independence of each house of the federal legislative branch and the branch as a whole from any interference by the executive or judicial branches of the federal government. The suit against agents of the House to bar them from implementing within the House the Members' exercise of their independent constitutional prerogatives is but a transparent effort

to frustrate the broad immunity afforded by the Clause and may not be countenanced.

Second. The power to judge qualifications of a Member and the power to expel a Member upon the concurrence of two-thirds are exclusively committed to the House and its Members by article I of the Constitution and may not be reviewed in any manner by a court acting under article III. The power of the House to judge qualifications as well as the power to punish or expel, like the power of the Senate to render a judgment of impeachment, "is beyond the authority of any other tribunal to review". *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613. The British precedents, as well as the colonial and early state practice in this country, vested the exclusive power to judge qualifications and to punish or expel in the legislature and denied it to the courts. That precedent and practice were reflected in the broad grant of adjudicatory authority to the House in article I and in the clearly intended exclusion of such power from the definition of the judicial power of this Court in article III. Moreover, even if article III were construed to permit Congress to create federal court jurisdiction over this subject, there is no statute granting such jurisdiction. Indeed, the only section of the Judicial Code creating any federal court jurisdiction with respect to the right of a person to a public office—28 U.S.C. § 1344 (1964)—specifically precludes jurisdiction in a case involving a United States Senator or Representative in Congress. *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), *cert. denied*, 336 U.S. 904.

Third. The complaint also represents an impermissible attempt to involve the federal courts in decision of a nonjusticiable political question. Many of the cri-

teria stated by this Court in *Baker v. Carr*, 369 U.S. 186, for identifying such a political question are present here. As indicated, article I, section 5 affirmatively commits to each house of the legislative branch power to judge qualifications of members and to punish or expel them. Moreover, the prohibitions erected by the Speech or Debate Clause against questioning of members and the Privilege from Arrest Clause bar effective enforcement of any court order against members with respect to a judgment excluding or expelling a member-elect. In addition, resolution of the controversy would not be possible "without expressing lack of the respect due coordinate branches of government." 369 U.S. at 217. All those factors emphasize the existence of a classic political question which is nonjusticiable.

The nonjusticiability of this action is most clearly exposed by the inability of any court to grant the relief originally sought. Neither injunction nor mandamus would have been available against the Members of the House or its agents with respect to official action within the House. See *Mississippi v. Johnson*, 4 Wall. 475; *Pauling v. Eastland*, 288 F.2d 126 (D.C. Cir. 1960), cert. denied, 364 U.S. 900; *Hearst v. Black*, 87 F.2d 68 (D.C. Cir. 1936); *Methodist Federation v. Eastland*, 141 F. Supp. 729 (D.D.C. 1956). An injunction action would not lie because the remedy would be unenforceable; mandamus would be unavailable because there was no ministerial duty which could be fairly separated from the discretionary act of the House and its Members in the exercise of its power to judge qualifications and to punish or expel. Compare *Marbury v. Madison*, 1 Cranch 137, 170, with *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318. The declaratory judgment remedy originally sought would be inappropriate.

ate because, there being no possibility of injunctive or mandatory relief, such a judgment would be an impermissible advisory opinion. *Pauling v. Eastland, supra*. Moreover, to the extent that such a declaratory judgment would be coercive, it would be barred by the Speech or Debate Clause. In addition, the declaratory judgment is procedural only and does not enlarge or alter the jurisdiction of the federal courts. That being so, it is subject to the same jurisdictional infirmities that pervade petitioners' other claims for relief.

II. Even if this Court or any other court could properly review the action of the House in this case—which we submit it cannot—the dismissal of the complaint must nevertheless be affirmed. Petitioners fail to state a claim on the merits for the following reasons:

First. The House acted within its constitutional power in excluding Mr. Powell based on its uncontested findings that he had been contemptuous of the New York courts and had wrongfully misappropriated public funds while a Member. The power of the House was exercised in accordance with the practice of the House of Commons in England, the colonial legislatures, and the early American states. The Framers clearly intended to incorporate that practice in our Constitution. In this regard, a distinction must be made between: (a) the power of Congress to pass statutes creating "standing incapacities" (i.e., general categories of status with prospective and universal application) in addition to those specified in the Constitution and (b) the power of either house, in judging the qualifications of its members, to exclude particular individuals as unfit for reasons of personal misconduct,

such as those set forth in House Resolution 278. Only the former is prohibited by the Constitution. There have been many occasions on which the House and Senate, as well as this Court, have recognized the power to exclude or expel under the latter circumstances.

Second. The power of the House to expel a Member upon a two-thirds vote "extends to all cases where the offense is such as in the judgment of the Senate [or House] is inconsistent with the trust and duty of a Member". *In re Chapman*, 166 U.S. 661, 669-70. House Resolution 278 finding that Mr. Powell had committed various acts of misconduct and denying him a seat was passed by more than a two-thirds vote and thus is equally supported by the House's power to expel.

Third. The action of the House did not impinge upon any rights petitioners may have had under other provisions of the Constitution. The action did not constitute a denial of due process of law, punishment by bill of attainder or denial of equal protection of the laws because of race.

III. Furthermore, all of the relief which petitioners are seeking in this action was properly withheld as a matter of sound judicial discretion. In the circumstances of this case—including the failure of Mr. Powell to invoke remedies and procedures available within the legislative branch both before and after his re-election on April 11, 1967; the unchallenged evidence of misconduct on his part; and the confrontation between the courts and the House posed by the relief requested—it was not an abuse of discretion for the courts below to decline to proceed.

IV. Finally, although we urge affirmance of the dismissal below as an appropriate termination of this con-

troversy, this case may also be dismissed as moot because, in any event, the relief requested is academic and cannot be granted in the present posture of this case. The 90th Congress is now history, and Mr. Powell is seated in the 91st Congress. Whatever rights Mr. Powell may have with respect to his claim for back salary, they cannot be asserted in a suit against the Sergeant-at-Arms, who is authorized by statute only to pay Members-elect in certain limited circumstances not relevant here and otherwise only to pay Members who had taken the oath. The action of the House of the 91st Congress in fining Mr. Powell \$25,000 as punishment in the exercise of its express power to punish is not before this Court and cannot be brought before it at this stage of these proceedings.

Argument

POINT I

The Federal Courts Lack the Constitutional Power and Competence To Review the Judgment of the House of Representatives of the 90th Congress To Exclude Mr. Powell.

Neither this Court nor any other court may properly review the action of the House in excluding Mr. Powell. That conclusion follows inexorably from the long Anglo-American history of the struggle for legislative independence and the culmination of that history in an amalgam of provisions contained in article I of the Constitution—the Speech or Debate Clause, the Power to Judge the Qualifications of a Member, the Power to Punish and to Expel a Member and the Privilege from Arrest Clause.

A. The Speech or Debate Clause Is an Absolute Bar to This Action.

This is an action against the House of Representatives. The named defendants are sued in their capacities as Members, both as individuals and as representatives of the entire class of Members (A. 10).

At the threshold, article I, section 6, clause 1 of the Constitution expressly bars this Court or any other court from "questioning" the action of the respondent Members, or their agents, which is challenged by the complaint. That provision, the so-called "Speech or Debate Clause", broadly provides:

"[F]or any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place."

That Clause underscores and enforces the separation of powers doctrine embedded in the Constitution and relied upon by the District Court.*

This is made abundantly clear from four centuries of English and American history as well as from this Court's four interpretations of the Speech or Debate Clause. *Dombrowski v. Eastland*, 387 U.S. 82; *United States v. Johnson*, 383 U.S. 169; *Tenney v. Brandhove*, 341 U.S. 367; *Kilbourn v. Thompson*, 103 U.S. 168. In all of those cases, this Court held that there was immunity

* That the Speech or Debate Clause bars this action was recognized by Judge Burger in the court below, although he did not rest his decision on that point (A. 84, 102). Judge McGowan did not find it necessary expressly to rely upon the Clause (A. 91 n.1). Judge Leventhal, on the other hand, while not joining in Judge Burger's opinion on the point (A. 95), in effect thought that the Clause would apply (A. 96 n.2).

even when only one or two members were involved. This case is a fortiori since the whole House itself is here sued.*

In the most recent of these cases, this Court held:

"It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the Speech or Debate Clause of the Constitution, *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881), that legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney v. Brandhove*, *supra*, 341 U.S. at 376, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. at 84-85.

The last point was emphasized in *Dombrowski*, for, as this Court had earlier said, "the privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney v. Brandhove*, 341 U.S. at 377.

The decision in *Dombrowski* is but the most recent affirmation of this Court's first decision involving the Clause, nearly 90 years ago in *Kilbourn*. The broad coverage of the Speech or Debate Clause was there made very clear:

"It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its com-

* Compare the analogous immunity enjoyed by the judiciary in order to perform their functions without fear of the consequences. *Pierson v. Ray*, 386 U.S. 547.

mittees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. *In short, to things generally done in a session of the House by one of its members in relation to the business before it.*" 103 U.S. at 204 (emphasis added).*

Petitioners raise a number of objections to application of the Speech or Debate Clause here.

First, they seem to imply that the debate and voting in the House which culminated in House Resolution 278 somehow did not constitute "legitimate" legislative activity and therefore are not protected by the Speech or Debate Clause (Br. 171).

Such a suggestion is foreclosed by this Court's earlier decisions. "Legitimate legislative activity" has been held by this Court to encompass activity which results in clear violation of a criminal statute, *United States v. Johnson*; alleged activity by state legislators which deprived a private citizen of his right to freedom of speech under the first amendment, *Tenney v. Brandhove*;^{**} alleged unlawful and unconstitutional seizure of private property, *Dombrowski v. Eastland*; and even the passage of a resolution

* The language of the clause in the seminal English Bill of Rights fully sustains this broad reading: "That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament". 1 COSTIN & WATSON, *THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS 1660-1914*, at 67, 68-70 (1952).

^{**} We are aware that the precise holding in *Tenney v. Brandhove* as to the power of the federal judiciary to entertain suits against state legislators may require reexamination in light of *Bond v. Floyd*, 385 U.S. 116. The rationale of *Tenney* as applied to the federal legislature, however, has continuing vitality. See *Dombrowski v. Eastland*, *supra*.

directing an illegal and unconstitutional incarceration of a private individual, *Kilbourn v. Thompson*. In short, "legitimate legislative activity" refers, not to the objective or motivation of legislative activity, but to the activity itself: conducting investigations and hearings, debating and passing resolutions, judging the qualifications and punishing the conduct of its members.

Since such conduct, even when it involves actions that are in excess of the legislative power, has nevertheless been held to be within the sphere of legitimate legislative activity, it follows a fortiori that the Members sued here cannot be called into question for speaking to and voting on a resolution passed pursuant to an explicit constitutional commitment to the House of the power to judge the qualifications of its Members and to punish or expel a Member. Thus, even if the House's exercise of those powers resulted in an action that is assumed to be wholly unwarranted and ill-considered, the Speech or Debate Clause precludes judicial interference with and questioning of that decision.

There is no need now to decide whether the Speech or Debate Clause is an absolute bar to any judicial proceeding against the Members of the House for any kind of purported legislative activity within the House, no matter how heinous. As the Court said in *Kilbourn v. Thompson*:

"It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief

Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand . . ." 103 U.S. at 204-05.

No such case of "utter perversion" has ever been presented to any article III court, and no such case is presented here.* Here, following the practice of the colonial legislatures and its own established precedents (*see pp. 70-90 infra*), the House has acted solely on grounds of personal misconduct. Accordingly, we respectfully submit that the Court should "decide only what is necessary to the case in hand", and uphold respondents' plea that the Speech or Debate Clause is a bar in the particular circumstances of this proceeding.

Second, petitioners ask this Court to question the Members of the House as to their unstated motivations in passing House Resolution 278. Although they must necessarily recognize that the express grounds for Mr. Powell's exclusion were his conduct, not his race, petitioners assert in their brief, but not in their complaint, that the exclusion of Mr. Powell "was at least in substantial part

* Even if it is assumed that the bar of the Speech or Debate Clause can ever be breached because the legislators engaged in an "utter perversion of their powers", it appears settled that unconstitutional action—even action which infringes individual personal freedoms guaranteed by the Bill of Rights—is not sufficient to pierce the bar of the Clause. *Kilbourn* itself, as well as *Tenney* and *Dombrowski*, teach that the Clause protects actions which directly, materially, and in violation of constitutional command, abridge personal liberties.

based upon reasons of race" (Br. 120). But the charge that the "conduct was improperly motivated . . . is precisely what the Speech or Debate Clause generally forecloses from executive or judicial inquiry." *United States v. Johnson*, 383 U.S. at 180; cf. *United States v. O'Brien*, 391 U.S. 367, 382-86. As Mr. Justice Frankfurter stated in *Tenney v. Brandhove*,

"The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California*, 283 U.S. 423, 455." 341 U.S. at 377.

Accordingly, petitioners' argument that House Resolution 278 must be appraised in light of the alleged improper motivations of the Members simply reinforces the conclusion that the "prophylactic purpose of the clause", *United States v. Johnson*, 383 U.S. at 182, can only be effectuated by affirming the dismissal of the complaint without further inquiry.

Third, although petitioners recognize that the Speech or Debate Clause bars the imposition of "criminal or civil sanctions of a deterrent nature" against legislators for their participation in "legitimate legislative activity", they seem to suggest that the Clause is impotent to shield legislators from the types of relief sought by the complaint (Br. 171).

Petitioners originally sought injunctive or mandatory relief directed against the Members. This form of relief is also barred by the Speech or Debate Clause, for the Clause is cast, not in terms of insulating members from liability for their acts, which would have been sufficient to protect them from the threat of civil damages or crim-

inal sanctions, but rather in broad language which precludes their being "questioned" about performance of their duties, or being proceeded against or placed under judicial compulsion of any kind to perform those duties in some other way.

The principal purpose of the Speech or Debate Clause is the "protection of the independence and integrity of the legislature" from encroachments by executives (or judges) who "utilized the criminal and civil law to suppress and intimidate critical legislators." *United States v. Johnson*, 383 U.S. at 178. In order to effectuate that purpose, the Clause must apply to bar injunctive and mandatory relief, for it is far simpler to suppress and intimidate critical legislators by direct order of a court of equity, with its attendant sanctions, than by the indirect threat of civil or criminal liability which is after the fact and which must be imposed by a jury.* *See Stamler v. Willis*, 287 F. Supp. 734, 738-39 (N.D. Ill. 1968), *vacated and remanded on other grounds*, 89 S. Ct. 677.

Petitioners do not overcome the defects of their prayer for injunctive or mandatory relief against the Members by now limiting their prayer to one for declaratory relief. *See* Memorandum for Petitioners in Opposition to Respondents' Memorandum Suggesting That This Action Should Be Dismissed As Moot 16 [hereinafter Petitioners' Memorandum]. Wholly apart from the consideration that declaratory judgment relief is not available in the pres-

* The application of the Speech or Debate Clause as a bar to injunctions against Members of the House is corroborated, not only by the general principle of separation of powers, but also by article I, section 6, clause 2 of the Constitution, which proscribes the arrest of a Member for contempt on account of a violation of any such injunction while attending or going to and from a session of the House. It may also be noted that in *Dombrowski*, the complaint dismissed as to Senator Eastland included a prayer for an injunction. *See* 358 F.2d 821, 822-23 (D.C. Cir. 1966).

ent posture of this case (*see* pp. 112-13 *infra*), it has long been recognized that declaratory relief will not lie where suit for an injunction is barred by the separation of powers. *Pauling v. Eastland*, 288 F.2d 126 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 900; *accord*, *Fischler v. McCarthy*, 117 F. Supp. 643, 649-50 (S.D.N.Y.), *aff'd on other grounds*, 218 F.2d 164 (2d Cir. 1954); *Randolph v. Willis*, 220 F. Supp. 355, 360 (S.D. Cal. 1963). *See also* *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127-28; *Pauling v. McNamara*, 331 F.2d 796 (D.C. Cir. 1963) *cert. denied*, 377 U.S. 933; *Goldstein v. Johnson*, 184 F.2d 342 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 879; *United States ex rel. Jordan v. Ickes*, 143 F.2d 152 (D.C. Cir. 1944), *cert. denied*, 320 U.S. 801; *Doehler Metal Furniture Co. v. Warren*, 129 F.2d 43 (D.C. Cir. 1942), *cert. denied*, 317 U.S. 663. Unless any declaratory judgment were to be a wholly gratuitous and useless act, it must rely for its efficacy upon the willingness of the Members to acquiesce in this Court's interpretation of the House's action. Thus, in so far as a declaratory judgment would be given force and effect by the Members' voluntary acquiescence, it "would be as effective an impingement upon and interference with legislative proceedings as a flat injunction would be", *Pauling v. Eastland*, 288 F.2d at 130.

It is apparent that the granting of the declaratory relief requested against the Members of the House would require the very thing which the Clause specifically interdicts, *i.e.*, questioning of the Members in the most direct manner, and would ignore both the "presuppositions of our political history", *Tenney v. Brandhove*, 341 U.S. at 372; *accord*, *United States v. Johnson*, 383 U.S. at 182-83, and the "prophylactic purposes of the clause", *id.* at 182, particularly in light of petitioners' suggestions of improper motivation.

Fourth and finally, petitioners suggest that "the immunity of the clause, whatever its scope, does not attach" to the non-member respondents, against whom they also seek relief (Br. 171). But, as this Court has recently pointed out, the doctrine is "applicable, when applied to officers or employees of a legislative body", even though it is "less absolute". *Dombrowski v. Eastland*, 387 U.S. at 85.

In each instance where this Court has upheld the maintenance of an action against an agent of the House in spite of the protection afforded by the Speech or Debate Clause, it has been with respect to some unlawful affirmative act performed outside the House which had a direct effect upon a private citizen. Thus, in *Kilbourn v. Thompson*, *supra*, the Sergeant-at-Arms was charged with having arrested a non-member outside the House. In *Dombrowski v. Eastland*, *supra*, counsel to a congressional subcommittee was alleged to have participated in a conspiracy with state officials in Louisiana to seize unlawfully a non-member's property. But the relief sought here relates solely to actions taken by the House, within the House, in the exercise of its express power to judge the qualifications of its Members, and to punish or expel them. The circumstances here are not even remotely similar to those in which agents of the House have been held subject to liability notwithstanding the Speech or Debate Clause. Moreover, a judgment against an officer or agent of the House would require him to perform an affirmative act which the House has expressly prohibited. In practical, as well as legal, effect, it would be identical to granting the same relief against the House itself.

The argument that an agent of the legislature could be compelled to seat a member-elect was persuasively disposed of by Lord Coleridge in *Bradlaugh v. Gossett*, 12 Q.B.D. 271, 276 (1884):

"I need not discuss at any length the fact that the defendant in this case is the Serjeant-at-arms. The Houses of Parliament cannot act by themselves in a body: they must act by officers; and the Serjeant-at-arms is the legal and recognised officer of the House of Commons to execute its orders. I entertain no doubt that the House had a right to decide on the subject-matter, have decided it, and have ordered their officer to give effect to their decision. He is protected by their decision. They have ordered him to do what they have a right to order, and he has obeyed them."

In the final analysis, the entry of any order against the non-members in this case, relating solely to their actions within the House pursuant to express orders of the House, would violate the immunity conferred upon the Members by the Speech or Debate Clause.

B. None of the Prerequisites for Subject-Matter Jurisdiction Is Present in This Case.

Even if there were no Speech or Debate Clause in our Constitution, the courts would be barred from proceeding because they lack jurisdiction over the subject-matter of this action. For the adjudicatory power over the subject matter of this action is delegated to the House by article I and not to the courts by article III. Thus, to ask this Court to decide this case is to ask it to transgress the separation of powers between the judicial and legislative branches of government.*

* We recognize that the Court of Appeals held that it did have such jurisdiction. Although doubts were expressed, the matter was deemed foreclosed by *Baker v. Carr*, 369 U.S. 186, and *Bond v. Floyd*, 385 U.S. 116. As we shall point out, those cases do not control. The Court of Appeals nevertheless declined to exercise subject-matter jurisdiction on a variety of grounds that we believe are fully supportable. See Points I C, II B and III.

There are at least three separate criteria, all of which must be satisfied, for federal subject-matter jurisdiction. Those criteria, stated negatively by this Court, are that:

(1) "the cause . . . does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, §2)";
or

(2) it "is not a 'case or controversy' within the meaning of that section;" or

(3) "the cause is not one described by any jurisdictional statute." *Baker v. Carr*, 369 U.S. 186, 198.

Not one of those criteria is satisfied here:*

1. *The Powers To Judge the Qualifications of Members and To Exclude or Expel a Member Are Conferred Exclusively on Each House of Congress by Article I, Section 5, and Not on the Courts by Article III.*

Article III vests "the judicial Power of the United States" in this Court and in such inferior courts as the Congress may establish. But all adjudicatory power is not thereby assigned to the courts. Under article I, section 5, each house is "the *Judge* of the Elections, Returns and Qualifications of its own Members" (emphasis added); under the same provision each house also has the power "to punish" its members for disorderly behavior and, with the concurrence of two-thirds, the power "to expel" a member; and under section 3 of article I the Senate is given "the sole Power to try all Impeachments." * Thus, in at

* While impeachment proceedings are rare, the Senate has decided what governmental offices properly subject their holders to impeachment (the offices of Senator and Representative do not), what offenses can be tried by impeachment, and whether a trial can

least four instances—all dealing variously with the right to hold office in the legislative, executive, or judicial branches—adjudicatory power is assigned to the legislative branch, and since that branch is co-equal with the other branches, the judgments it makes are exclusive and supreme. Each of these delegations of judicial power under article I is thus an “explicit exception to the general grant of judicial power to the courts under Article III.” Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 540 (1966).

Two provisions of article I are involved here.

First, the action of the House in excluding Mr. Powell was taken pursuant to the House's express constitutional power to judge the qualifications of its Members.

Second, the exclusion of Mr. Powell from the House of Representatives of the 90th Congress was a decision equally supported by the House's express constitutional power, upon a two-thirds vote, to expel a Member.

Traditionally legislative bodies in England and this country have regarded the exercise of these powers to be theirs exclusively, and not the prerogatives of the courts. This Court as well as others has concurred. In *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613, for example, this Court in a unanimous opinion stated that

be had notwithstanding a prior resignation by the office holder. See, e.g., *William Blount*, 5th Cong., 1st Sess. (1797), SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS, SENATE COMMITTEE ON RULES AND ADMINISTRATION, SENATE ELECTION, EXPULSION AND CENSURE CASES, S. Doc. No. 71, 87th Cong., 2d Sess. 3 (1962) [hereinafter SENATE CASES]. Surely the Senate's decisions, whether right or wrong, cannot be reviewed by any court. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959).

"[e]xercise of the power [to judge the qualifications] necessarily involves . . . the power . . . to render a judgment which is beyond the authority of any other tribunal to review." And in *Baker v. Carr*, Mr. Justice Douglas, concurring, noted, "[O]f course, each House of Congress, *not the Court*, is 'the Judge, of the Elections, Returns, and Qualifications of its own Members.'" 369 U.S. at 242 n.2 (emphasis added). See also *Reed v. County Comm'rs*, 277 U.S. 376, 388; *Jones v. Montague*, 194 U.S. 147, 153; *In re Chapman*, 166 U.S. 661, 668-70.

The same conclusion has been reached by a number of lower courts, two of which deserve special comment. In *Sevilla v. Elizalde*, 112 F.2d 29 (D.C. Cir. 1940), the court was asked to determine whether a territorial commissioner possessed the requisite qualifications for holding office and, if he did not, to enjoin him from sitting (without vote) in the United States House of Representatives because his appointment had not been made in the manner required by law. In concluding that the matter in issue was beyond its jurisdiction, the court of appeals squarely held:

"We think it clear also that the courts have no authority to pass upon the qualifications of a delegate from a territory. Article I, section 5 of the Constitution provides that 'each house shall be the judge of the elections, returns, and qualifications of its own members. . . .' And the Supreme Court has recognized that although these powers are judicial, as distinguished from legislative or executive, in type, they have nevertheless been lodged in the legislative branch by the Constitution." *Id.* at 37.

In *In re Voorhis*, 291 F. 673 (S.D.N.Y. 1923), Judge Learned Hand refused to quash a House subpoena issued to a state board of elections in connection with a contested election

proceeding in the House, holding that the court lacked subject-matter jurisdiction. Judge Hand said,

"[t]he House is the exclusive judge of the 'elections, returns and qualifications of its own members.' Assuming that the ancillary power to perpetuate testimony must have the sanction of Congress, clearly it is the House alone which must on the contest, as a court, determine whether the procedure so created has been regularly followed. Consider the effect of a contrary notion. I am invited here to declare that the notice given under section 105 is insufficient. This is the only reason urged by the petitioner for quashing the subpoena. *But that question is justiciable by the House, and by the House alone. Suppose I were to take sides with the petitioner, and my decision were affirmed by the Circuit Court of Appeals, or perhaps by the Supreme Court on certiorari? Is the House to yield to that decision? Clearly not; the Constitution has put that matter exclusively in its own hands.*" *Id.* at 675 (emphasis added).

Accord, Manion v. Holzman, 379 F.2d 843, 845 (7th Cir. 1967), *cert. denied*, 389 U.S. 976; *Johnson v. Stevenson*, 170 F.2d 108 (5th Cir. 1948), *cert. denied*, 336 U.S. 904; *Seymour v. United States*, 77 F.2d 577, 579-80 (8th Cir. 1935); *Application of James*, 241 F. Supp. 858, 860 (S.D.N.Y. 1965) ("the federal courts have no jurisdiction to pass on the qualifications . . . of any member of the House of Representatives"); *Peterson v. Sears*, 238 F. Supp. 12 (N.D. Iowa 1964); *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934) ("the power of the respective Houses of Congress with reference to the qualifications . . . of its members is supreme"); *Rankin v. Cenarusa*, Civ. No. 39700 (Idaho Dist. Ct. Sept. 28, 1967).

The conclusion of many commentators is the same. See COOLEY, CONSTITUTIONAL LIMITATIONS 189-90 (7th ed. 1903); 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 831-33 (4th ed. Cooley 1873); Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW 36 (Cahn ed. 1954); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 540 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959); Note, *The Political Question Doctrine and Adam Clayton Powell*, 31 ALBANY L. REV. 320, 335 (1967); Note, *The Legislature's Power To Judge the Qualifications of Its Members*, 19 VAND. L. REV. 1410-12 (1966).

The conclusion reached by all these authorities is not rebutted by petitioners' argument that this case involves important constitutional questions. This is an action against the House in which petitioners attack its exercise of an adjudicatory power expressly conferred by article I. The power conferred on the courts by article III does not authorize this Court to do anything more than declare its lack of jurisdiction to proceed. Those cases in which this Court has found federal subject-matter jurisdiction because they involved important questions "arising under the Constitution" are not determinative here, since none of them involved the express delegation of judicial power to the houses of Congress by article I.*

This is particularly true of *Baker v. Carr*,^{*} *supra*, and *Bond v. Floyd*, 385 U.S. 116, which were relied upon below.

* See, e.g., *Baker v. Carr*, 369 U.S. at 198; *Bell v. Hood*, 327 U.S. 678; *Hart v. B. F. Keith Vaudeville Exch.*, 262 U.S. 271, 274; *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579. See generally WRIGHT, FEDERAL COURTS 48-52 (1963); Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 649 (1942); Mishkin, *'The Political Question' in the District Courts*, 53 COLUM. L. REV. 157, 165-68 (1953).

as foreclosing the question of subject-matter jurisdiction. In those cases, this Court was not presented with a question of the allocation of federal adjudicatory power as between the legislative branch under article I and the judicial branch under III. Both simply involved unconstitutional state action which this Court had the power to review under the Supremacy Clause. And it is not to be assumed that those cases decided sub silentio the question of subject-matter jurisdiction presented here, since the Court has only recently emphasized the complexities involved in determining whether subject-matter jurisdiction exists. *Flast v. Cohen*, 392 U.S. 83.

Nor should the House's freedom from judicial review cause concern that the House might unreasonably or erroneously exercise its judicial powers. Members of the House (and Senators), like the Justices of this Court, take an oath to support the Constitution (U.S. CONST. art. VI, cl. 3) and it cannot be presumed that they will violate that oath. There is always a risk of error—even of constitutional error—on the part of each branch of the Government in the areas in which it is granted supreme constitutional competence. But this is not a weakness of our system of government; it is one of its strengths. As Judge Burger noted below:

"That each branch may thus occasionally make errors for which there may be no effective remedy is one of the prices we pay for this independence, this separateness, of each co-equal branch and for the desired supremacy of each within its own assigned sphere. When the focus is on the particular acts of one branch, it is not difficult to conjure the parade of horrors which can flow from unreviewable power. Inevitably, in a case with large consequences and a paucity of legal precedents, the advocates tend to raise the spectre of the

hypothetical situations which would be permitted by the result they oppose. Our history shows scant evidence that such dire predictions eventuate and the occasional departures in each branch have been thought more tolerable than any alternatives that would give any one branch domination over another. That courts encounter some problems of which they can supply no solution is not invariably an occasion for regret or concern; this is an essential limitation in a system of divided powers. That courts cannot *compel* the acts sought to be ordered in this case recedes into relative insignificance alongside the blow to representative government were they either so rash or so sure of their infallibility as to think they should command an elected co-equal branch in these circumstances" (A. 89-90) (emphasis in original).

Moreover, as Professor Chafee has observed: "It is no answer [to the lack of judicial review] to say that if the House of Representatives should exclude a man on some whimsical ground, no appeal would lie from its action. Neither is there any appeal from the Supreme Court." CHAFEE, *FREE SPEECH IN THE UNITED STATES* 253 (1941) [hereinafter CHAFEE].* Likewise, there is no appeal from a judgment of impeachment. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959).

* The remedy for any unreasonable or erroneous action of the House in the exercise of its adjudicatory powers is a political one. The Member-elect who was excluded or expelled may seek re-election, and the voters of his district may return him to office. Such an action by the electorate, of course, will naturally be seriously weighed by the House in taking further action with respect to the same Member. This happened here. After being excluded, Mr. Powell was promptly re-elected from the 18th Congressional District and could have presented himself for admission in April 1967. However, Mr. Powell chose not to present himself. He was again re-elected at the general election last year and then took his seat.

Thus, even if the House had judged erroneously in this case (which it did not), that fact in and of itself provides no basis for judicial review under article III. Just as the courts will strike down any attempt by the legislature to expand the judicial power beyond the bounds of article III, *Marbury v. Madison*, 1 Cranch 137, or any attempt by the executive to invade the field of legislation, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,* so must the courts recognize the limitations on their own judicial power which result from the commitment by the Constitution of a matter to another branch, *Marbury v. Madison*, 1 Cranch at 170. Such a commitment is the historical limitation on the judicial power codified in the provisions of the Constitution giving each house the power to judge the qualifications of its members and to expel a member.

2. *This Is Not a Case or Controversy of a Judiciary Nature.*

The two words describing the scope of federal judicial power, "cases" and "controversies", "have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast v. Cohen*, 392 U.S. at 94. They indicate that only cases of "a judiciary nature", i.e., cases cognizable in law and equity, can be entertained and resolved. That was made clear at the Constitutional convention:

* Petitioners make much of the fact that in *Sawyer* the Court struck down illegal action by the executive branch and urge that that decision authorizes this Court to strike down the allegedly illegal action by the legislative branch. But the Constitution does not vest in the executive any power to determine the correctness of its own actions similar to the power given to the legislature to determine the qualifications of its Members, to discipline them for misconduct and to expel them.

"Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

"The motion of Doctr. Johnson [to extend the judicial power to all cases arising under] was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary Nature." 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (rev. ed. 1966) [hereinafter FARRAND].

To determine what cases the Framers believed were "of a judiciary nature", and thus within the scope of article III, it is necessary to examine the historical context in which the framers operated:

"Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Coleman v. Miller*, 307 U.S. 433, 460 (Frankfurter, J., concurring).

See also *Glidden Co. v. Zdanok*, 370 U.S. 530, 563; *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 150 (Frankfurter, J., concurring); *Atlas Ins. Co. v. W. I. Southern*,

Inc., 306 U.S. 563; 568.* Such an examination reveals that where the Framers did intend to depart from the familiar English judicial practice, they wrote into the Constitution explicit provisions to that effect, as for example, by extending the judicial power to cover cases in equity. 2 FARRAND at 428.** On the other hand, the manner in which they drafted article I, section 5 did not represent any departure from what was to them the familiar practice of conferring exclusive adjudicatory power to the legislative branch to judge qualifications of members and to expel or punish them.

Historically, the power to judge the qualifications of and to exclude or expel a member-elect of the legislature was a power of each house of Parliament, not of the courts of common law. Indeed, the courts at Westminster and in this country before 1789 were conspicuously denied power to review judgments of the legislature concerning

* But even then, the practices of the English judicial system may not be determinative where there are "implicit policies embodied in Article III" which call for an even more restrictive federal judicial power. See *Flast v. Cohen*, 392 U.S. at 96-97.

** Especially significant is the Convention's treatment of impeachment. In England, impeachments were brought by the House of Commons to be tried before the House of Lords, not before the courts of common law. 4 BLACKSTONE, COMMENTARIES* 259-61. On this side of the Atlantic, on the other hand, one state vested the power to try such cases in the judiciary (7 THORPE, FEDERAL AND STATE CONSTITUTIONS 3818 (1909)); three others granted the state senate the power (3 *id.* at 1897; 4 *id.* at 2461; 5 *id.* at 2798); and three others created special tribunals composed of legislators and others to try such cases (5 *id.* at 2635, 3087; 6 *id.* at 3253-54). While the United States Senate was ultimately given this power under our Constitution (2 FARRAND 493, 497, 547, 572, 592, 653), under the Virginia and New Jersey plans, the judiciary was to have had this power (1 *id.* at 22, 244, 247), a proposal initially adopted by the Convention as a Committee of the whole (*id.* at 223-24, 231, 232, 237, 238) but later rejected by the Convention (2 *id.* at 39, 46). In addition, the Pinckney and Hamilton plans proposed different forums (1 *id.* at 292-93; 2 *id.* at 136, 159; 3 *id.* at 608, 618-19, 626-27).

the elections, qualifications and conduct of its members. Our Constitution meant to continue that practice.*

(a) *The English Practice.*

The right of the legislature to be the sole and exclusive judge of the elections and qualifications of its members and to exclude or expel them developed as a part of the struggle for legislative independence which this Court reviewed in *United States v. Johnson, supra*. In 1604, James I acquiesced in the Commons' position in the case of Sir Francis Goodwin that they, and not the Chancellor, were the proper judges of the election of their members. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 333 (11th ed. Plucknett 1960) [hereinafter TASWELL-LANGMEAD]: Thereafter,

"It was fully recognized as their exclusive right by the court of Exchequer Chamber in 1674, by the House of Lords in 1689, and also by the courts of law in 1680 and 1702. Their right was further recognized by the Act 7 § 8 William 3, c. 7, which declared that 'the last determination of the House of Commons of the right of election, is to be pursued.'" *Id.* at 318 (footnotes omitted).

In *Barnardiston v. Soame*, 6 How.-St. Tr. 1063 (1674), Judge Atkins wrote that among the matters in which the courts "must not intermeddle" is the determination by the House of Commons of questions concerning election of their members:

* The highlights of that historical background are discussed herein. A fuller treatment is set forth in Appendix D, which is separately bound. We wish to note our gratitude to Dorsey D. Ellis, Jr., Associate Professor of Law at the University of Iowa, College of Law, for his investigation of the various original sources discussed therein.

"But we know that the House of Commons is now possessed of the jurisdiction of determining all questions concerning the election of their own members; so far at least, as is in order to their being admitted or excluded from sitting there." *Id.* at 1083-86.

In this conclusion, the other judges concurred. *Id.* at 1073, 1098.

Blackstone, perhaps the most widely read and most influential of the legal commentators known to the framers, emphasized the lack of jurisdiction in the English courts, stating

"The lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case." 1 BLACKSTONE, COMMENTARIES *163.

The significance of that statement is underscored when he subsequently makes clear that the "whole judicial power" of the kingdom is delegated "to the judges of [the] several courts." *Id.* at *267. Thus, the clear implication of Blackstone's statement is that the power to "judge of the elections" of a member, which included the power to judge the qualifications of the elected, was not part of the "judicial power." *

The law of England at the time of the Revolution was thus clear—the House of Commons had exclusive juris-

* In the debate on the exclusion of John Wilkes, Blackstone stated: "Sir: I think it incumbent upon me to declare, that in my opinion, this House is competent in the case of elections, and that there is no appeal from its competence to the law of the land." 16 PARL. HIST. ENG. 802 (1813).

diction to judge the elections and qualifications of its members. No part of that power resided in or was exercised by the courts of England.

(b) *The Colonial Practice.*

The embryonic legislatures of the American colonies early asserted and began to exercise the exclusive power to judge the qualifications of their members. Like Parliament, their power was exclusive; there are, to our knowledge, no instances where any court in any of the colonies ever exercised judicial review over a legislative adjudication of the qualifications of its members.

The first legislative body to appear in the new world was the House of Burgesses of Virginia, whose practice provides an excellent illustration. It first convened on July 30, 1619, and on that date the qualifications of three Members were immediately challenged; one was seated, two were excluded. See *JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1619-1659*, at 4-5 (1915). In 1692, the House of Burgesses:

"Resolved nemine Contradicente that the house of Burgesses are the Sole & only Judges of the Capacity or incapacity of their owne members, and that any Sherrieff or other person whatsoever pretending to be a Judge of ye capacity or incapacity of any member of the House of Burgesses does thereby become guilty of a Breach of the Priviledges of the said House of Burgesses." *JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1659-1693*, at 379-81 (1914).

What was true in Virginia was true elsewhere—the power to judge qualifications and to exclude or expel was exclusive and never a part of the jurisdiction of the

courts.* Professor Clarke concludes that "[t]he widespread acceptance of the belief that such power [to judge the qualifications of its members] belonged to the legislature was as great in the colonies as in England."

CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 198 (1943) [hereinafter CLARKE]. She also concludes that the exercise of that power by the colonial legislatures was not infrequent and that there were at least a hundred persons who were excluded or expelled for one reason or another from the assemblies in the Continental Colonies. *Id.* at 195 n.58.

(c) *The Early State Practice.*

With that colonial background, it is not surprising to find that in most of the constitutions adopted by the states during the revolutionary period, the houses of the state legislatures were expressly given exclusive jurisdiction to judge the elections and qualifications of their members and

* See, e.g., 3 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 227, 265-66 (1881), where the Assembly replied, in response to the complaint of the King's Governor about the exclusion of a member for refusing to take an oath:

"We expell'd that member for several contempts; for which we are not accountable to your excellency, nor no body else in this province: We might lawfully expel him; and if we had so thought fit, might have rendered him incapable of ever sitting in this house; and of this many precedents may be produced. We are the freeholders representatives; and how it's possible we should assume a negative voice at the election of ourselves, is what wants little explanation to make it intelligible." *Id.* at 265-66.

See also New York's *Charter of Liberty and Privileges of 1683* which provided:

"That the said representatives are the sole judges of the qualifications of their own members, and likewise of all undue elections, and may from time to time purge their house as they shall see occasion during the said sessions." 9 *ENGLISH HISTORICAL DOCUMENTS* 229 (Jensen ed. 1955).

to exclude or expel them.* Again, we have found no indication that the courts of any colony or state, prior to 1789, ever sought to exercise judicial review over legislative determinations rendered pursuant to that power.**

(d) *Summary.*

At the time of the Constitutional Convention it had been settled for over a century that no court had jurisdiction to review a decision of the legislature determining the qualifications of its members. Exclusive jurisdiction over such matters was in the legislatures. An assumption of such power by the judiciary would thus have been unthinkable to the Framers. Clearly, then, disputes over qualifications to sit were not thought to be "cases or controversies of a judiciary nature". Accordingly, such controversies were not intended to be within the scope of judicial power conferred by article III upon the federal courts.

3. *The Subject Matter of This Case Is Not Described in Any Jurisdictional Statute.*

Even if this case against the Members of the House were of a type which the Constitution authorized the federal judiciary to consider, it would not necessarily follow that federal courts would have jurisdiction to decide it. Jurisdiction of the lower federal courts, as well as the appellate jurisdiction of this Court, is dependent upon an affirmative grant by the Congress. See, e.g., U.S. CONST. art. III, §§ 1, 2; *Romero v. International Terminal Operating Co.*, 358 U.S. 354; *Lauf v. E. G. Shinner & Co.*, 303 U.S.

* The state constitutions in effect as of 1787 are conveniently collected in THORPE, FEDERAL AND STATE CONSTITUTIONS (1909). A summary of the relevant provisions of those constitutions is set forth in Appendix B to this brief.

** As is developed below at pages 72-79, expulsion and exclusion were not always clearly distinguished.

323, 330. It is therefore necessary to examine critically the statutory basis for jurisdiction asserted in the complaint.

Of several alleged statutory bases, the only colorable allegation of jurisdiction is 28 U.S.C. § 1331(a) (1964), which provides for jurisdiction over "all civil actions" in which the "matter in controversy" exceeds \$10,000 and which "arises under the Constitution". This provision merely codifies the power given to the courts under article III and thus has no application here for the same reasons that article III has no application here. See pp. 35-49 *supra*. However, even if this action were within the seemingly all-embracing language of section 1331(a) which, we submit, it is not, Congress never intended that section to embrace a case of this nature.

Section 1331(a) had its genesis in the Act of March 3, 1875, which encompassed "suits of a civil nature at common law or in equity" in which the "matter in dispute" exceeded \$500 and which were "arising under the Constitution". 18 Stat. 470 (1875). As has been noted by this Court, there is a paucity of legislative history of the Act, *Zwicker v. Koota*, 389 U.S. 241, 246 n.8. Indeed, one comment has suggested it may have been "sneak" legislation. Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642-43 (1942). See also HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 729-30 (1953); Forrester, *The Nature of a 'Political Question'*, 16 TULANE L. REV. 362, 374-75 (1942).

In the absence of any meaningful legislative debate, we must look, therefore, at the circumstances at the time the statute was passed.

As of 1875, it was unquestioned that legislatures had exclusive power to judge the qualifications of its members, and to exclude or expel them and that a suit like the instant

one was not a "case" or "controversy" in the constitutional sense or a "suit of a civil nature, at common law or in equity".* Moreover, it was precisely in this period of Reconstruction that both the House and Senate were excluding and expelling many members-elect, and only five years had passed since the House's exclusion of B. F. Whittemore of South Carolina for selling appointments to the military and naval academies.** It seems exceedingly unlikely, therefore, that Congress meant to depart from this unbroken tradition and to subject its exclusions and expulsions to judicial scrutiny when it enacted the above Act in 1875. This conclusion is underscored by the requirements of a jurisdictional amount. In a matter of this fundamental constitutional concern, it hardly seems likely that Congress should have intended the jurisdiction of the federal courts to turn on the happenstance of the requisite minimum jurisdictional amount.

Furthermore, only five years before the passage of the above Act, Congress had created a more specific grant of jurisdiction that excluded cases like the present one. That was section 23 of the "Force Act" of May 31, 1870, ch. 114, 16 Stat. 146.† The statute granted jurisdiction over cases in which a person alleged that he had been "defeated" or "deprived of his election" to any office or had his right "to hold and enjoy such office, and the emoluments thereof" impaired as a result of a denial of fifteenth amendment rights.

* This language was changed to "civil action" in the 1952 Code. Compare 28 U.S.C. §41(1) (1946) with 28 U.S.C. §1331 (1952). The Reviser's Note to the latter states, "Words 'all civil actions' were substituted for 'all suits of a civil nature, at common law or in equity' to conform with Rule 2 of the Federal Rules of Civil Procedure." *Id.* at 4186.

** See Appendix C for a summary of the congressional precedents regarding exclusion or expulsion.

† Now 28 U.S.C. §1344 (1964).

Moreover, and very explicitly, it excepts even from that limited jurisdiction cases involving the offices of "elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or members of a state legislature." The purpose of the specific exceptions was described on the floor of the House as follows:

"It was thought important by the conference committee that the courts of the United States under no possible condition of things should be authorized to intervene to settle any case of contest whatever about the election of members of Congress, about the election of electors for President or Vice President of the United States, or about the election of the members of a State Legislature, leaving the last under the constitutions of the several States to be settled exclusively by the bodies to which they were elected." CONG. GLOBE, 41st Cong., 2d Sess. 3872 (1870).

This interpretation of section 1344 was followed by the Fifth Circuit in *Johnson v. Stevenson*, *supra*. There the court unanimously held that section 1344 deprived it of jurisdiction over a suit to enjoin the Democratic Party from certifying Lyndon B. Johnson as the nominee of that party for United States Senator from the State of Texas. A like conclusion follows a fortiori in this action which seeks to enjoin the House of Representatives and to require it to seat a Member-elect.*

* Petitioners also argue that a three-judge court should have been convened. However, since the resolution challenged here was not an Act of Congress as required by 28 U.S.C. §2282 (1964), a three-judge court would not have been proper. *Stamler v. Willis*, 89 S. Ct. 677, *vacating and remanding so appeal could be taken to court of appeals*, 287 F. Supp. 734 (N.D. Ill. 1968); *Krebs v. Ashbrook*, 275 F. Supp. 111, 118 (D.D.C. 1967), *aff'd per curiam*, No. 21382 (D.C. Cir. May 14, 1968), *cert. denied*, 89 S. Ct. 619.

Thus, we submit, the subject matter of this suit does not come within the judicial power delegated to the courts in article III, is not a case or controversy arising in law and equity as described in article III, section 2 and is not described by any jurisdictional statute. If we are correct on any one of these three points, the decision below must be affirmed since there is a lack of subject matter jurisdiction. *Baker v. Carr*, *supra*.

C. In Addition, the Issues in This Case Are Political Questions Which Are Not Justiciable.

Petitioners seek to have this Court review the decision of the House to exclude Mr. Powell for reasons of personal misconduct and malfeasance in office. However, the ultimate question thus presented—whether the House's action was proper—is in its nature “political” and “can never be made in this court”. See *Marbury v. Madison*, 1 Cranch at 170 (emphasis added). This Court's duty with respect to such a question

“... is to take for a guide the decision made on them by the proper political powers, and, whether right or wrong ... enforce it till duly altered. ...” *Luther v. Borden*, 7 How. 1, 56 (dissenting opinion). See also *id.* at 47 (opinion of the Court).

The most considered analysis of the political question doctrine is contained in *Baker v. Carr*, *supra*. There, this Court concluded that “it is the relationship between the judiciary and the coordinate branches of the Federal Government ... which gives rise to the ‘political question’,” and that “nonjusticiability of a political question is primarily a function of the separation of powers.” 369 U.S. at 210.

The Court then delineated the standards which identify a political question:

"Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 217 (emphasis added).

As that formulation makes clear, the several standards are framed in the alternative, and, if any one is "inextricable from the case at bar", *ibid.*, a political question is present.

Several of the criteria enunciated in *Baker v. Carr*, *supra*, are inextricable from the issues of this case.

1. *There Is a Textually Demonstrable Exclusive Commitment of the Adjudicatory Power Over This Case to the House of Representatives.*

The first test laid down by this Court, and the most significant for present purposes, is whether there is "a textually demonstrable constitutional commitment of the issues to a coordinate political department." *Ibid.*

The Constitution makes clear that the subject matter of this case in whatever form it takes—action for declaratory judgment or for injunction and mandamus or for back salary—is for decision by the House of Representatives alone. Article I, section 5, provides:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members

"Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

As Judge Burger said,

" . . . The language that 'Each House shall be the judge' can hardly mean less than that the Members, for this purpose, become 'judges,' withdrawing judging of qualifications from the judicial branch." (A. 70)

It is no answer to this unexceptionable proposition simply to assert, as petitioners have done (Br. 160), that the courts might, were the power theirs, interpret the word "qualifications" differently from the House.* In judging the qualifications of a Member or in excluding or expelling a Member, the House sits "as a judicial tribunal", *Barry v. United States ex rel. Cunningham*, 279 U.S. at 616, which necessarily implies the power and duty to interpret the law, including the Constitution. To say that the House might have interpreted the law incorrectly in the eyes of this or any other Court is not the equivalent of saying that it has exceeded the power committed to it or that this Court can review such a determination. Cases such as *Barry v. United States ex rel. Cunningham*, *supra*, and the others discussed above (pp.

* Petitioners' argument that this Court is the "ultimate interpreter of the Constitution" (Br. 26), is simply not correct with respect to those adjudicatory powers entrusted by the Constitution to either house. It is the House, not this Court, which must interpret the meaning of the terms "Qualifications" and "disorderly Behaviour" under article I, section 5, or of the term "Inhabitant" under article I, section 2.

37-38 *supra*) as well as the history of the clause, pp. 45-49 *infra*, make it clear that the subject matter involved in this case is expressly and "demonstrably" committed by the Constitution to the House for final resolution.*

Accordingly, the particular political question involved here is one which goes to the subject-matter jurisdiction of the federal courts. While *Baker v. Carr*, *supra*, distinguished lack of subject matter jurisdiction from non-justiciability, that distinction was made only in the context of that particular case and was surely not meant to impair the continuing validity of a long series of prior cases holding that the existence of certain political questions precluded federal subject-matter jurisdiction. 369 U.S. at 210.

This was made clear by the recent case of *Flast v. Cohen*, 392 U.S. 83. There, this Court pointed out that justiciability is "a concept of uncertain meaning and scope", and a "blend of constitutional requirements and policy considerations." *Id.* at 95, 97. This Court also said there are two "complementary constitutional considerations" which are promoted by the concept of justiciability:

" Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* at 97.

* While scholars and textwriters have disagreed on the criteria which delineate a political question in other contexts, all we have found agree that the power to judge the qualifications of members of the House is a political question for exclusive resolution by the House. CHAFEE 253; Dodd, *Judicially Non-Enforceable Provisions of the Constitution*, 80 U. PA. L. REV. 54, 56 (1931); Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 540 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6-10 (1959); Note, *The Political Question Doctrine and Adam Clayton Powell*, 31 ALBANY L. REV. 320 (1967).

As our discussion of the relationship between article I and article III powers demonstrates, as indeed the text of the Constitution itself makes abundantly clear, any action by this Court other than "mere acknowledgment of exclusive Congressional power", *Coleman v. Miller*, 307 U.S. 433, 459 (Black, J., dissenting), is in no wise consistent with a system of separated powers", *Flast v. Cohen*, 392 U.S. at 97.*

This case, therefore, is analogous to past decisions of this Court holding that the particular political questions there involved were not appropriate subject matters of federal jurisdiction. Like the instant case, those involved the consideration of functions committed by the Constitution to a coordinate branch of the federal government.

Prominent among those authorities are cases involving alleged violations of and based on the Guaranty Clause, which hold that federal courts have no subject-matter jurisdiction whatever to determine whether state action has deprived the citizens of a state of a "Republican Form of Government" since that question has been constitutionally committed to Congress. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151; *Kiernan v. City of Portland*, 223 U.S. 151, 164, 166; *Taylor & Marshall v. Beckham (No. 1)*, 178 U.S. 548, 578; *Georgia v. Stanton*, 6 Wall. 50. In all four cases, this Court held that there was no subject-matter jurisdiction.**

* Unlike the issues in the instant case, the standing question in *Flast v. Cohen* did not raise separation of powers problems related to improper judicial interference in areas committed to other branches of the federal government. 392 U.S. at 100.

** Article IV, section 4 provides:

"The United States shall guarantee to every State in this Union a Republican Form of Government. . . ."

It is noteworthy that nowhere in article IV, section 4 does the term "Congress" or "houses of Congress" appear expressly. Never-

So too, political questions involving the enactment of constitutional amendments have generally been regarded as expressly entrusted to Congress by article V of the Constitution. *Cf. Dillon v. Gloss*, 256 U.S. 368. When a majority of five suggested in dicta that the courts might possess some power to review congressional judgments on those matters, *Coleman v. Miller, supra*, they were sharply rebuked in a dissent by Mr. Justice Black joined by three other Justices. (Douglas, Frankfurter, and Roberts) in clear and uncompromising language:

"Since Congress has sole and complete control over the amending process, subject to no judicial review, the views of any court upon this process cannot be binding upon Congress, and insofar as *Dillon v. Gloss* attempts judicially to impose a limitation upon the right of Congress to determine final adoption of an amendment, it should be disapproved. . . .

"Congress, possessing exclusive power over the amending process, cannot be bound by and is under no duty to accept the pronouncements upon that exclusive power by this Court or by the Kansas courts. Neither state nor federal courts can review that power. Therefore, any judicial expression amounting to more than mere acknowledgment of exclusive Congressional power over the political process of amendment is a mere admonition to the Congress in the nature of an

theless, this Court has uniformly held that the "guarantee" accorded by the Clause has been entrusted to Congress and may not be enforced by the courts. See *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612; *Ohio ex rel. Bryant v. Akron Park District*, 281 U.S. 74, 79-80. Having reached that conclusion with respect to a constitutional provision that nowhere mentions the Congress, this Court, it seems to us, must reach a similar conclusion with respect to a constitutional provision (article I, section 5) that expressly and specifically commits the matter in issue here to "Each House".

advisory opinion, given wholly without constitutional authority." 307 U.S. at 459-60.

Relying on those cases, therefore, we conclude that federal courts do not have subject-matter jurisdiction to decide a political question, such as the qualifications of a Member, which has been expressly and exclusively committed to the House. That conclusion is especially compelling when, as is the case here, Members of the House themselves are parties and the Court is asked to enter relief directly against them as representing the House itself. Cf. *Georgia v. Stanton*, *supra*; *Mississippi v. Johnson*, *supra*.

2. *The Courts Cannot Mold Effective Relief for Resolving This Case. Even If They Could, To Do So Would Create a Potentially Embarrassing Confrontation Between Coordinate Branches.*

Moreover, additional criteria of a political question are present here, as are the policy considerations which result in nonjusticiability.

As this Court noted in *Flast v. Cohen*, *supra*, one of the policy considerations which is not always clearly distinguished from constitutional considerations is the restriction of federal courts to cases traditionally thought of as being capable of resolution through the judicial process. 392 U.S. at 97. And in *Baker v. Carr*, *supra*, this Court wrote, "In the instance of nonjusticiability . . . the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and *whether protection for the right asserted can be judicially molded.*" 369 U.S. at 198 (emphasis added).

The first and most formidable barrier to the granting of any relief is the Speech or Debate Clause, which, as we

have previously demonstrated, precludes this Court from interfering in the legislative process by questioning the Members (and their agents) for their vote on Mr. Powell. Secondly, there is the privilege from arrest given to each Member in article I, section 6, which renders any attempt to enforce an order against the House ineffectual and unconstitutional. The Framers could not have intended judicial review of decisions of the House pursuant to article I, section 5, because such review would have inevitably sparked a confrontation between the branches of government which the Speech or Debate and Privilege from Arrest Clauses were designed to prevent.

Considerations such as these compel the conclusion that neither injunction, mandamus nor declaratory relief is available against the Members and agents of the House respecting official action within the House. This case accordingly presents a nonjusticiable political question, as the court below held.*

(a) *Injunction.*

In *Mississippi v. Johnson, supra*, for example, this Court held that its equity power was limited by the separation of powers:

"Neither [the legislative nor the executive branch] can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." 4 Wall. at 500.

* See A. 66-78 (Burger, J.), A. 92-93 n.3 (McGowan, J.). Judge Leventhal did not travel the political question route to arrive at the unanimous conclusion of nonjusticiability, but he reached the same result on more conventional grounds (A. 95-101). As he noted, the relief requested is discretionary, and the denial of the relief was not an abuse of discretion for the reasons stated in Point III, *infra*.

More recently, the same rule was reiterated in *Trimble v. Johnston*, 173 F. Supp. 651, 653 (D.D.C. 1959):

"[T]he judicial branch of the Government may not control or direct the legislative or executive departments. Thus, the Federal courts may not issue an injunction or a writ of mandamus against the Congress."

No previous action has sought to enjoin the entire Congress or either house thereof. There have, however, been cases which attempted to enjoin congressional committees. In those cases the courts have uniformly determined that such an action will not lie. It follows, a fortiori, that this suit, which is against the entire House, is barred.

In *Hearst v. Black*, 87 F.2d 68 (D.C. Cir. 1936), suit was brought to enjoin a Senate subcommittee from copying and using telegraph messages in alleged violation of various constitutional and statutory provisions. The Court of Appeals held that the suit could not be entertained, stating,

"[T]he universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference." *Id.* at 71.

Accord, Pauling v. Eastland, 288 F.2d 126 (D.C. Cir. 1960); *cert. denied*, 364 U.S. 900; *Mins v. McCarthy*, 209 F.2d 307 (D.C. Cir. 1953) (court will not enjoin congressional hearing); *Stamler v. Willis*, 287 F. Supp. 734 (N.D. Ill. 1968), *vacated and remanded on other grounds*, 89 S. Ct. 677; *Randolph v. Willis*, 220 F. Supp. 355 (S.D. Cal. 1963) (court will not enjoin hearing of House Committee on Un-American Activities); *Methodist Federation v. Eastland*, 141 F. Supp. 729 (D.D.C. 1956) (court will not enjoin Senate subcommittee from publication of report); *Fischler v.*

McCarthy, 117 F. Supp. 643, 647-50 (S.D.N.Y.) (court will not enjoin Senator from compelling production of documents), *aff'd on other grounds*, 218 F.2d 164 (2d Cir. 1954).*

The agents of the House named in the complaint are also immune from an injunction in this case for much the same reasons that are applicable to the Members themselves. As we have shown, the Speech or Debate Clause protects the non-member agents from suit. Directly in point is *Methodist Federation v. Eastland*, *supra*. There a three-judge court, in a suit to enjoin publication of a document ordered published by a concurrent resolution of both Houses, dismissed for failure to state a claim as to the Public Printer and the Superintendent of Documents. The court there held: "We have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Congressional Record." 141 F. Supp. at 731-32. *See also Bradlaugh v. Gossett*, 12 Q.B.D. at 27.**

* A further reason why injunctive relief cannot be granted is the long-recognized rule that there is no "federal equity power" to determine title to a public office. *See Baker v. Carr*, 369 U.S. at 231. Thus, this Court has held that a federal court lacks power to enjoin a state proceeding to remove a public officer, *Walton v. House of Representatives*, 265 U.S. 487; *In re Sawyer*, 124 U.S. 200, and to enjoin the removal of a federal officer, *Keim v. United States*, 177 U.S. 290; *White v. Berry*, 171 U.S. 366, 376-77; *Ex parte Hennen*, 38 U.S. 230.

** The analogous doctrine of sovereign immunity, barring suits to compel a government official to take official action (except in the limited class of cases where mandamus lies) is also applicable. *See, e.g., United States ex rel. Brookfield Constr. Co. v. Stewart*, 234 F. Supp. 94 (D.D.C.), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964); *Randolph v. Willis*, *supra*.

(b) *Mandamus.*

Mandamus under 28 U.S.C. § 1361 (1964) is also unavailable to petitioners in view of the barriers described above. See *Trimble v. Johnston*, 173 F. Supp. 651, 653 (D.D.C. 1959) ("the judicial branch . . . may not control or direct the legislative . . . department. . . . Thus, the Federal courts (may not issue . . . a writ of mandamus against the Congress").

Indeed, neither the Members nor the agents of the House are officers or employees of the United States within the meaning of section 1361. The Act does not define the words "officer or employee of the United States or any agency thereof," nor is there any general definition of those terms applicable to title 28 or to the code as a whole. The legislative history makes clear, however, that the statute was not aimed at legislative officials. Both committee reports stated that the primary purpose of the bill was to facilitate "review by the Federal courts of administrative actions". There is no suggestion in the reports of an intent to cover Members of Congress or officers or employees of Congress. S. REP. NO. 1992, 87th Cong., 2d Sess. (1962); H.R. REP. NO. 536, 87th Cong., 1st Sess. (1961); cf. U.S. CONST. art. I, 6, amend. XIV, 3.

Consideration of the bill in the Senate and the House themselves was perfunctory. The manager of the bill in the House stated, however, that it was instigated by the "growth in the size and power of the executive branch of the Government". 107 CONG. REC. 12157 (1961). Surely if Congress had intended to subject its members and agents to questioning by the courts, some extensive reference would have been made to the point in the committee reports or in debate.*

* Further indication of the congressional understanding that legislative officials and personnel were not covered by the statute is

Moreover, mandamus will lie only to compel performance of a ministerial duty and never to impinge upon official discretion. Certainly mandamus does not lie to compel a Member of Congress to vote or refrain from voting, or to take or refrain from taking any other action within the House in the course of his official duties. *Compare Marbury v. Madison*, 1 Cranch at 166, 170-71, with *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318.

Furthermore, since Members of the House cannot be subjected to mandamus, the same result cannot be achieved indirectly by mandamus against the officers of the House. For example, to require the Speaker to administer the oath despite the opposition of over two-thirds of the Members would be simply another way of ordering the House to cause the oath to be administered. Administering the oath under such circumstances can hardly be considered a ministerial act.

The issuance of a writ of mandamus to compel the Sergeant-at-Arms to pay Mr. Powell's back salary cannot issue for additional reasons. The Sergeant-at-Arms is an elected officer of the House, 2 U.S.C. §83 (1964), nominated by the caucus of the majority party for each new Congress, and by law, he is obligated to "keep the accounts for the pay and mileage of Members . . . and pay them as provided by law", 2 U.S.C. § 78 (1964). An individual has a

derived from the precedents interpreting the constitutional phrase "officer of the United States". See, e.g., 17 Op. ATT'Y GEN. 419, 420 (1882) ("it seems that a member of Congress is not an officer of the United States in the constitutional meaning of the term"); *Dröpps v. United States*, 34 F.2d 15, 17 (8th Cir. 1929), cert. denied, 281 U.S. 720 (in the constitutional sense, an "officer of the United States . . . is one who is appointed by the president or by a court of law or by the head of a department"); *Hare v. Hurwitz*, 248 F.2d 458, 461 (2d Cir. 1957) ("The phrase 'officer of the United States' . . . is understood as referring only to those government officials appointed by the President, by members of his Cabinet, or by the courts . . ."). See also *United States v. Mouat*, 124 U.S. 303; *United States v. Germaine*, 99 U.S. 508; *Kennedy v. United States*, 146 F.2d 26 (5th Cir. 1944).

right to a Member's salary without taking the requisite oath only if there is an interval of time between the commencement of his term and the beginning of the first session, 2 U.S.C. § 34 (1964). Otherwise, he is entitled to the salary only "after he has taken and subscribed the required oath", 2 U.S.C. § 35 (1964).*

It is clear, therefore, that Mr. Powell has no statutory right to obtain back salary from the Sergeant-at-Arms. He has no right under 2 U.S.C. § 34 (1964), for that provision only permits Representatives-elect to be paid a salary for the period "from the beginning of their term until the beginning of the first session of each Congress".** Nor does he have a right under 2 U.S.C. § 35 (1964), since he never took the requisite oath in the 90th Congress. There is, therefore, no statutory basis for mandamus directing the Sergeant-at-Arms to pay over any alleged back salary to Mr. Powell, even if the action of the House in excluding Mr. Powell were deemed wrongful.†

* Article VI, clause 3 of the Constitution requires that "Representatives . . . shall be bound by Oath of Affirmation, to support this Constitution . . ." See also 2 U.S.C. §25 (1964). In addition, section 6 of article I provides that "Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."

** That right of a Representative-elect will not usually arise in light of the fact that the term of Representatives and the beginning of the first session of the Congress will normally fall on the same day. U.S. CONST. amend. XX. Although Mr. Powell's term commenced on January 3, 1967, U.S. CONST. amend. XX, and the first session of the 90th Congress did not meet until January 10, 1967, 113 CONG. REC. H1 (daily ed. Jan. 10, 1967), by the terms of House Resolution 1 of that Congress, he was paid a salary until March 1, 1967. *Id.* at H14; 118 CONG. REC. H1956-57 (daily ed. Mar. 1, 1967).

† In actual fact, the Sergeant does not have sufficient funds to pay Mr. Powell's \$55,000 salary claim (*cf.* 2 U.S.C. §31 (1964)). Separate accounts for Representatives' salaries are created by the Treasury for each fiscal year. See, e.g., Legislative Branch Appropriation Act, 1967, P.L. 89-545, 83 Stat. 354 (1966); Legislative Branch Appropriation Act, 1968, P.L. 9357, 81 Stat. 127 (1967); Legislative Branch Appropriation Act, 1969, P.L. 90-417, 82 Stat.

Moreover, any order directing the Sergeant-at-Arms to pay any money to Mr. Powell would engender a direct confrontation between coordinate branches of the Government; this time between the Court and the House of the 91st Congress. Since the Sergeant has no statutory authority to pay Mr. Powell his back salary, the only way he could be authorized to make such payment would be by special resolution of the present House, similar to House Resolution 1 of the 90th Congress, authorizing the payment of salary from the House contingency fund. See Legislative Branch Appropriation Act, 1969, P.L. 90-417, 82 Stat. 398 (1968); cf. 31 U.S.C. § 671 (1964). This Court cannot direct the House to pass such a resolution.

There is, therefore, no way this Court can order the Sergeant to pay Mr. Powell. To collect such a claim, Mr. Powell would need an order from this Court either compelling the Sergeant to ignore 2 U.S.C. § 35 (1964), or compelling the House of the 91st Congress to pass a special resolution authorizing the Sergeant-at-Arms to pay him from the contingency fund. Such an order would, of course, be wholly beyond this Court's power to grant, wholly apart from the fact that the present House is not even a party to the action.

Finally, with respect to the general prayer to have Mr. Powell accorded "rights, privileges and emoluments" to which a duly elected and qualified Representative is entitled,

398 (1968). And it is the custom of the Sergeant to turn back to the Treasury all unexpended funds after the close of each fiscal year. See 2 U.S.C. § 80 (1964); 31 U.S.C. § 671 (1964). See generally *Romney v. United States*, 167 F.2d 521 (D.C. Cir. 1948), cert. denied, 334 U.S. 847; *Crain v. United States*, 25 Ct. Cl. 204 (1890). Thus, the Sergeant has returned to the Treasury the bulk of the funds allocated as compensation for the Representative of the 18th Congressional District of New York in the 90th Congress. The only such funds still held are those covering salary for the present fiscal year commencing July 1, 1968.

a directive so expressed is too vague to be an appropriate subject either for relief by injunction or mandamus.*

(c) *Declaratory Judgment.*

Nor can petitioners obtain declaratory relief in lieu of an injunction or mandamus. See 28 U.S.C. §§ 2201-02 (1964). As *Pauling v. Eastland*, *supra*, makes clear, declaratory relief will not lie where a court could not ultimately give injunctive or other coercive relief. Accord, *Randolph v. Willis*, 220 F. Supp. at 360; *Fischler v. McCarthy*, 117 F. Supp. at 649-50. See also *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127-28; *Pauling v. McNamara*, 331 F.2d 796 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 933; *Goldstein v. Johnson*, *supra*; *United States ex rel. Jordan v. Ickes*, *supra*; *Doehler Metal Furniture Co. v. Warren*, *supra*.

Petitioners thus cannot overcome the defects of their prayer for injunctive or mandatory relief by limiting their prayer to one for declaratory relief, Petitioners' Memorandum 16, especially in light of the fact that this action

* The state cases cited by petitioners in which mandamus was issued against state legislative officials are not even remotely on point. See, e.g., *State ex rel. Donnell v. Osburn*, 147 S.W.2d 1065 (Mo. 1941); *State ex rel. Benton v. Elder*, 31 Neb. 169, 47 N.W. 710 (1891). First, none of them involved 28 U.S.C. §1361, a federal statutory provision which by its terms does not apply to members or agents of the House. Second, those cases, in the main, involved acts of a purely ministerial nature (compelling the Speaker to open and publish election returns) and not the wholly discretionary act of judging the election and qualifications of a candidate to a contested office. The distinction between those two acts—opening and publishing election returns, a ministerial act, and judging the elections and qualifications of political candidates, a discretionary act—was clarified in the subsequent Nebraska decision, *State v. Van Camp*, 54 N.W. 113, 118 (Neb. 1893), where the court made clear that *State ex rel. Benton v. Elder*, *supra*, did not apply to the discretionary act of judging elections and qualifications. See also *French v. Senate of California*, 146 Cal. App. 604, 80 P. 1031 (1905).

does not now have "sufficient immediacy and reality" to warrant a declaratory judgment. *See Golden v. Zwickler*, 37 U.S.L.W. 4185 (U.S. Mar. 4, 1969); pp. 112-13 *infra*.

In summary, it is beyond the power of this or any other court to mold any of the relief which petitioners sought. And even if a remedy could be molded, it could not be done, as Judge Burger observed, contrary to the action of the House "without expressing lack of respect due coordinate branches of government" or without creating "a potentiality of embarrassment from multifarious pronouncements by various departments on one question" (A. 71-72). This unavailability of a remedy and the constitutional considerations previously discussed intertwine with and reinforce each other, and lead inexorably to the conclusion that the issues raised by petitioners in this action are all non-justiciable political questions.

POINT II

The Action Taken by the House of the 90th Congress Was a Proper Exercise of the Powers Delegated to It by the Constitution.

As we have demonstrated, the action of the House of the 90th Congress in excluding Mr. Powell is not reviewable by this Court or by any other court for a variety of constitutional reasons designed to protect the independence and integrity of the legislative branch of the government. Accordingly, it is not necessary for the House to justify its actions in the courts.

However, the importance of the subject matter impels us to demonstrate, as we do below, that even if the House's action were reviewable, the complaint was properly dismissed, as respondents alternatively moved, for failure to state a claim. The House's action was a proper exercise of

its constitutional power to judge the qualifications of its Members or, alternatively, to expel a Member upon the vote of two-thirds, and it did not infringe upon any constitutional provisions. Thus, the Court of Appeals' affirmance of the District Court's dismissal of the complaint must be affirmed.

Both of these constitutional powers—the power to judge qualifications and the power to expel—have sound underpinnings in policy and in history.

Ours, of course, is a republican form of government. The citizens do elect their representatives to the Congress, but this does not automatically lead to the conclusion that the nation as a whole has to accept the choice of a single electoral district. The citizens of the entire nation, speaking through their representatives in Congress, have an interest in not having persons demonstrably unfit passing upon legislation which will affect the entire citizenry. In short, each house of the Congress has a duty "to assure the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government" (A. 94, McGowan, J., concurring) by removing the "obvious cases of unfitness". CHAFEE 257. These obvious cases of unfitness would include instances in which voters from a single district sent to the national legislature a man who was insane, *cf. John M. Niles*, SENATE CASES 10, or who had been convicted of treason or sedition. They would also include a man who abused the privileges of office by misappropriating public funds or who contumaciously flouted the valid orders of a court of law. Once the power of the House to deal with such cases of unfitness is recognized, as surely it must, it would be entirely inappropriate for this Court to substitute its judgment for the judgment of the House

in determining what is sufficient "unfitness" to justify exclusion or expulsion.

This is a case where the House found obvious unfitness. Mr. Powell was found by the Select Committee and by the House itself to have unlawfully and wilfully misappropriated public funds and to have contumaciously ignored the processes and authority of the courts of the State of New York. Those findings are unchallenged in this litigation.*

As we shall show below, the Framers did not intend to ban the prevailing British and Colonial practice of the times, which permitted legislative bodies to exclude elected candidates on grounds of individual misconduct (treason, corruption and the like) in violation of conventional standards of personal behavior.**

A. The Exclusion of Mr. Powell Was a Proper Exercise of the House's Power To Judge the Qualifications of Its Members.

As noted before, article I, section 5 of the Constitution grants each house of the Congress the power to judge the

* It is true that the grand jury which was considering criminal charges against Mr. Powell was dismissed without returning any indictment against him. See 115 CONG. REC. H5 (daily ed. Jan. 3, 1969). The failure of the United States to prosecute Mr. Powell is as irrelevant to the action of the House, as would be the failure to prosecute or a prosecution itself to a judgment of impeachment based on the same misconduct. See U.S. CONST. art. I, § 3, cl. 7. Criminal prosecutions serve different functions, are governed by different procedures, and are carried on in different forums than the exercise of the power granted in the Constitution to judge qualifications, to exclude, to expel, or to impeach.

** This Court need not in this case consider the question whether the House or Senate could constitutionally exclude members-elect on grounds such as an individual's race, his religious beliefs, or the exercise of his right of free speech. But even if the House or Senate should ever exclude someone for any such reason (which has never occurred), an article III court would not necessarily be empowered to enjoin an equal branch of the Government from taking such action, even though the court found it to be unconstitutional.

qualifications of its members, while section 2 of article I sets forth in negative form qualifications as to age, citizenship and inhabitancy:

Mr. Powell, of course, was found to have possessed the necessary age, citizenship and inhabitancy. Nonetheless, he was excluded, and that exclusion is consistent with the intent of the Framers of the Constitution with respect to provisions for judging qualifications. Although the Framers intended to prohibit Congress from passing laws adding new "standing incapacities" applicable to all who might seek office, *e.g.*, a property requirement, the Constitution clearly grants to each house of the Congress the right to adjudge an individual member as unqualified in a particular case for reasons of personal misconduct.

This conclusion follows from the historical background against which the Framers acted and wrote, the proceedings of the Constitutional Convention, the ratification of the Constitution and subsequent history.* Petitioners' contention to the contrary rests upon Professor Charles Warren's *The Making of the Constitution* (1928) [hereinafter WARREN]. They recoil at the suggestion that Professor Warren might have erred as to one of the many conclusions reached in his monumental historical study. But since the time he wrote, much work has been done by historians in exploring the operations of the colonial legislative bodies,** and we believe he would have been the first to

* We have set forth our findings in detail in Appendix D, which is separately bound. We discuss here only the highlights of that historical background.

** Particularly pertinent here are CLARKE 132-204, and GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES*, 198-99 (1963) [hereinafter GREENE].

urge that his historical interpretation should be continually reappraised in the light of subsequent research.*

1. *The Intention of the Framers*

Before discussing the proceedings at the Constitutional Convention and the ratification campaign, it is first necessary to look at the background against which the Framers acted and wrote—the practices of the House of Commons and of the colonial and early state legislatures.

(a) *The English Practice.*

Petitioners' discussion of and emphasis upon the *Wilkes Case* leaves the impression that the powers to exclude or expel exercised by the House of Commons in that instance was without precedent in law or custom. But *The Journal of the House of Commons* (1803) [hereinafter C.J.] makes clear that the power had long existed and had been exercised in a number of cases, extending back to as early as 1553, when the Commons excluded a member because, as a clergyman, he had a voice in the established church's legislative body. 1 C.J. 27.

One of the most famous exercises of the power occurred in 1712, when Robert Walpole, who had been expelled for receiving kickbacks on defense contracts, was re-elected while still incarcerated in the Tower of London. The House resolved that he was "incapable of being elected a Member to serve in this present Parliament". 17 C.J. 128. Owing to the prominence of the member involved, the *Walpole Case* was a *cause celebre* in its day, and appears to have been well known in America at the time the Constitution was drafted. See PROCEEDINGS RELATIVE TO . . . THE [PENNSYL-

* Cf. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

VANIA] CONSTITUTIONS OF 1776 AND 1790, at 89 (1825) [hereinafter PENN. CONST. PROC.].

Like Walpole, Wilkes was initially 'expelled' from the House of Commons, in 1769, following his conviction in the Court of Kings Bench on a charge of seditious libel. *Proceedings in the Case of John Wilkes*, 19 How. St. Tr. 1075, 1124 (K.B. 1768); 16 PARL. HIST. ENG. 533-35, 545 (1813). Thereafter, Wilkes was re-elected and the House of Commons resolved that he was "incapable of being elected a member to serve in this present Parliament". *Id.* at 580. Twice again he was re-elected and each time excluded. *Id.* at 580-81, 583-90.

Wilkes was subsequently elected to the next Parliament and was as a matter of course allowed to sit. He and his supporters pressed throughout the period of the American Revolution for a declaration by the later House of Commons that the action on the part of the earlier House was improper. They did not prevail until 1782 in the aftermath of the major political upheaval following the ignominious defeat at Yorktown. 1 COSTIN & WATSON, *THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS 1660-1914*, at 235 (1952).*

Although the motion expunging from the record the resolutions pertaining to Wilkes' expulsion and exclusions characterized them "as being subversive of the Rights of the whole Body of Electors of this Kingdom", *ibid.*, even

* Although the resolution "expelled" Wilkes, he had not been seated and sworn when it was passed. 16 PARL. HIST. ENG. 533-35, 545 (1813). Cf. Judge McGowan's opinion in the Court of Appeals (A. 92-94). As noted in Appendix D, the powers to exclude and to expel were often used interchangeably.

** Significantly, although Wilkes and his supporters pressed for some thirteen years to have the resolutions concerning him declared improper by the Commons, they never sought to invoke judicial interference in such internal parliamentary matters.

this corrective was on Parliament's own initiative,* and that legislative body thereafter continued to exercise the power to judge the qualifications of its members with respect to matters of individual character and conduct. See TASWELL-LANGMEAD 585-86; *Bradlaugh v. Gossett*, *supra*; ARNSTEIN, THE BRADLAUGH CASE 53-62, 73, 96, 114-115, 129 (1965).

Shortly before the American Revolution, the state of the law with respect to the power of the House of Commons to judge the qualifications of its members was conveniently summarized by Blackstone, an authority heavily relied upon by 18th-century American lawyers. He first listed, in negative form, the "standing incapacities" for membership in either house imposed by statute and law and custom of Parliament, which were general standards of prospective and universal application. He then added a statement reflecting Parliament's decision in the *Wilkes Case* and his own extensive investigation of the many precedents supporting that decision:

"And there are not only these standing incapacities; but if any person is made a peer by the king, or elected to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member: and this by the law and custom of parliament." 1 BLACKSTONE, COMMENTARIES *163 (4th ed. 1770 and subsequent editions) (footnotes omitted).

He then turned to the qualifications for membership in the House of Commons. Again, he first listed, also in negative

* As we note in Appendix D, at 24 n.*, we have been unable to find that this resolution, which was passed during the American Revolution, came to the attention of 18th century Americans at any time before the Constitution was ratified.

form, those which were "standing restrictions and disqualifications", *id* at *176 which included age, citizenship, office, inhabitancy, property ownership and attainder of treason or felony. *Id.* at *175. And again he noted that for reasons beyond those "standing restrictions and disqualifications" a person could be disqualified:

"But, subject to these standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible for that parliament by a vote of the house of commons, or for ever by an act of the legislature." *Id.* at *176 (footnotes omitted) (emphasis in original).

Blackstone justified the result in the *Wilkes Case* in a more extensive analysis in a pamphlet entitled *The Case of the Late Election for the County of Middlesex Considered on the Principles of the Constitution, and the Authorities of Law* (hereinafter *Middlesex Election*), which was reprinted in a compilation entitled *An Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England* (Philadelphia 1773). In this pamphlet, Blackstone canvassed in some detail a large number of precedents, including most of those discussed in Appendix D, as well as a number of others.

Blackstone's pamphlet, together with the *Commentaries*, undoubtedly served to inform American lawyers and political leaders of the long list of precedents establishing the House of Commons' traditional power to judge qualifications. It was with the knowledge of this long-standing tradition that the Framers wrote into the Constitution that each House shall have the power to judge the qualifications of its members and to expel them.

We do not suggest that the Framers approved of the particular actions which the Commons took in expelling and excluding Wilkes, or the grounds upon which it relied. But significantly, and with the full knowledge of how those powers had been employed as to Wilkes, they expressly conferred upon the houses of the American legislative branch the traditional exclusive powers of each house of Parliament to judge the qualifications of its members, to discipline them for misconduct, and to expel them.

(b) *The American Colonial and Early State Experience.*

We have traced in the English Parliament the growth of the doctrine that a legislature has the inherent power to judge the qualifications of its members and to discipline them for misconduct. The same development had its parallel in the American colonial legislatures. The first legislative body to appear in the new world was the House of Burgesses of Virginia, which first convened on July 30, 1619. On that very day, it commenced to judge the qualifications and elections of its members and excluded two of those members, *JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1619-1659*, at 4-5 (1950), even though the Royal Commission establishing the House of Burgesses did not expressly give it the power to judge the qualifications of its members. See 7 THORPE 3810 & n. a.

Throughout the colonial period, the legislatures of the colonies

"not only claimed the right to judge of the commonly recognized qualifications, such as age, residence, and property holding, but placed further restrictions on the voters' rights of representation by the reaction of the assembly itself to the personal conduct of individual men. The wide-spread acceptance of the belief

that such power belonged to the legislature was as great in the colonies as in England." CLARKE 198.*

See also *id.* at 195 n.58; GREENE 198-99.

The charters of several of the colonies expressly provided that the assembly should possess the power to judge the qualifications of its members. See, e.g., *Fundamental Orders of Connecticut*, par. 9 (1638), in 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 24 (Trumbull ed. 1850); *New York Charter of Liberties and Privileges of 1683*, in 9 ENGLISH HISTORICAL DOCUMENTS 229 (Jensen ed. 1955); *Pennsylvania Charter of Liberties of 1701*, in 2 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 58 (1852). Significantly, neither the New York nor the Pennsylvania charters set forth any specific qualifications for membership.

In nine of the 11 state constitutions adopted prior to the Constitutional Convention of 1787, the houses of the state legislatures were expressly, or by implication, given the jurisdiction to judge the elections and qualifications of their members.** The other two of the 11 state constitutions, like the colonial charters in the two remaining states, had no provision whatsoever on this matter, quite arguably indicating an intent not to depart from the Anglo-American practice described above.†

In only two of those constitutions—Massachusetts and New Hampshire—were provisions included which directly limited the assembly's power to judge qualifications. The

* Other examples from the colonial legislatures are collected in Appendix D, at 28-38.

** See Appendix B; Appendix D at 39.

† See Appendix D at 39.

Massachusetts constitution of 1780 provided that "the house of representatives shall be the judge of the returns, elections, and qualifications of its own members, *as pointed out in the constitution* . . ." MASS. CONST. ch. I, § III, art. v (1780) [emphasis added]. The constitution of New Hampshire, which appears to have been copied from Massachusetts, contains language substantially similar to that of Massachusetts, N. H. CONST. part II (1784). As can be seen from this language, the lower houses of Massachusetts and New Hampshire, in judging the qualifications of their elected members, were restricted to those specifically enumerated in their constitutions.*

The early constitutions of three other states—Pennsylvania, Delaware and Maryland—contained restrictions on the power to expel, which arguably had the effect of limiting the exercise of the power to judge qualifications. Each constitution provided that a member could not be expelled a second time for the same cause. PENN. CONST. ch. II § 9 (1776); DEL. CONST. art. 5 (1776); MD. CONST. art. X (1776). It seems reasonable to surmise that it was the intent of the framers of those constitutions to prevent the legislatures from disqualifying an expelled member from reelection, as Parliament and the colonial legislatures had done. In doing so, they may well have had in mind the *Wilkes Case*, which was at that time relatively recent.

We have found reference to only two exclusion or expulsion cases during the eleven years between the Declaration of Independence and the Constitutional Convention of 1787.** In 1780, the Virginia Assembly excluded John

* See Appendix D at 39-41.

** In part this is attributable to the fact that fewer of the records of legislative proceedings during that period have been published.

Breckenridge on the ground that he was a minor, WARREN 423 n.1, even though there were no provisions in the Virginia Constitution requiring members to have attained their majority or expressly empowering the houses of the legislature to judge their members' qualifications.

The second case is particularly interesting because of the attention it commanded and because it occurred only four years before the Constitutional Convention of 1787. In 1783, the General Assembly of Pennsylvania excluded a member for frauds committed while a commissioner of purchases, pursuant to their power to judge qualifications. PENN. CONST. PROC. 88-89 (1825). The Pennsylvania Council of Censors discussed the case at length in their report, adopted in 1784. *Ibid.**

(c) *The Constitutional Convention of 1787.*

It is apparent from the foregoing that when the Constitution Convention met in 1787, the phrase "judge the qualifications", *without express language of restriction*, had become a term of art with a well-defined and widely understood meaning: the legislature had exclusive discretion to exclude or expel members who, by reason of personal character or conduct, had demonstrated themselves unfit to

* Professor Warren appears to have been unaware of this Pennsylvania case. For he states, as petitioners emphatically point out (Br. 34) that "there is, so far as appears, no instance in which a State Legislature, having such a provision in its Constitution, undertook to exclude any member for lack of qualifications other than those required by such Constitution". WARREN 424. Indeed, Professor Warren's statement seems to imply that he was equally unaware of the many colonial cases which had transpired prior to the Revolution.

Obviously, Professor Warren did not have the benefits, now available to all, of Professor Clarke's thorough and scholarly study of colonial precedents.

undertake the responsibilities of membership. The actions of the Convention of 1787 indicated a clear intent to adhere to and not deviate from the well-established meaning of that phrase.

The Convention, having deliberated since May 25, 1787, adjourned on July 26, after referring its proceedings to the Committee of Detail, 2 FARRAND 128. It was in that Committee that the language of article 1, section 2, clause 2, began to take shape. See *id.* at 178. Edmund Randolph had made an outline for discussion in committee of the provisions which the Constitution should contain, based upon the resolutions of the Convention. Each item in the document is either checked off or crossed-out, indicating that it was used in the preparation of subsequent drafts. *Id.* at 137 n.6. The item dealing with qualifications of members of the House of Representatives reads as follows (matter in italics crossed out; matter in parentheses represents changes made by Randolph):

"5. The qualifications of (a) delegate(s) shall be the age of twenty five years at least, and citizenship: *and any person possessing these qualifications may be elected except*" *Id.* at 139.

Had the parenthetical language been adopted, it would have suggested an intention to repudiate the legal basis for the English and American precedents, including the *Wilkes Case*. When the clause was reported to the Convention, however, the parenthetical language of restriction had been eliminated. *Id.* at 178. It thus seems clear that the Committee on Detail considered and expressly rejected language which probably would have imposed a limitation upon the historic power to judge qualifications.

The clause remained in affirmative form when it was submitted to the Committee of Style on September 10, *id.*

at 565. When the Committee of Style reported out the clause on September 12, however, it had been recast in the negative form in which it now appears, *see id.* at 590. It was the pen of Gouverneur Morris, a lawyer from Pennsylvania and member of the Committee of Style, *id.* at 553, which gave "[t]he *finish* . . . to the style and arrangement of the Constitution", 3 *id.* at 499. Morris stated that he had "rejected redundant and equivocal terms" so as to make the Constitution "as clear as our language would permit". *Id.* at 420. It is, therefore, noteworthy that he recast that clause into the negative form which Blackstone used when listing "standing incapacities", above and beyond which the House of Commons could adjudge a member incapable of sitting for other reasons. 1 BLACKSTONE, COMMENTARIES *163, *176 (4th ed. 1770 and subsequent citations). If it had been the intent of the Framers to limit the House's power to that of judging the "qualifications" set forth in article I, section 2, then the change made by the Committee of Style, particularly in light of the wide circulation of the *Commentaries* in America, made the language more—not less—equivocal. Thus, it is fair to conclude that this change was effected to make clear that the Framers intended only to prescribe the standing incapacities without imposing any other limit on the historic power of each house to judge qualifications on a case-by-case basis.*

* Only a few years after the Constitutional Convention, John Randolph cogently explained the significance of that change:

"If the constitution had meant (as was contended) to have settled the qualification of members, its words would have naturally run thus: 'Every person who has attained the age of twenty-five years and been seven years a citizen of the United States, and who shall, when elected, be an inhabitant of the State from which he shall be chosen, shall be eligible to a seat in the House of Representatives.'" Quoted in *Case of Brigham H. Roberts*, H.R. REP. No. 85, pt. 1, 56th Cong., 1st Sess. 13 (1900).

The Committee of Detail had also reported out a provision which would enable the legislature to establish uniform qualifications for membership with regard to property. 2 FARRAND 179. It is largely upon the rejection of that provision by the Convention that Professor Warren bases his conclusion that the two houses can judge only age, citizenship and inhabitancy. See WARREN 420. "For", states Warren, "certainly [the Convention] did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress". *Id.* at 421. But an analysis of the action taken by the Convention on that clause, in light of the English and colonial background against which the Framers were writing, demonstrates that in rejecting the clause the Convention was merely depriving Congress of the power to pass laws creating new "standing incapacities" and not the power of each house to judge qualifications and exclude or expel on grounds of individual personal misconduct.

When the Convention considered that clause as reported out by the Committee of Detail, *i.e.*, that Congress be empowered to establish prospective "uniform qualifications . . . with regard to property", Madison made his often-quoted speech:

"Mr. [Madison] was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being

jealous of them, as there was for relying on them with full confidence, when they had a common interest. This was one of the former cases. It was as improper as to allow them to fix their own wages, or their own privileges. It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised by the stronger in order to keep out partisans of a weaker faction." 2 FARRAND 249-50 (footnotes omitted).

Thus, when read in the context in which it was made (both Warren and petitioners, it should be noted, take this speech out of context and place it after Morris' motion, discussed below, WARREN 420, Br. 30-32), it becomes clear that Madison was directing his argument to the proposition that Congress should have the unlimited power to establish "standing incapacities" in an area which had traditionally been the subject of legislation in both England and the colonies. See 1 BLACKSTONE, COMMENTARIES *176; WARREN 416-17. It is equally clear that, in speaking of the threat of converting a republic into "an aristocracy or oligarchy", Madison's reference was to the property requirements which had been imposed as restrictions upon membership in Parliament and which, unlike the power to judge qualifications, had in fact been used to keep "an aristocracy or oligarchy" in power, as Blackstone candidly notes.* It was after, not before (cf. Br. 30-31), this speech by Madison that a motion

* "That every knight of a shire shall have a clear estate of freehold or copyhold to the value of six hundred pounds per annum, and every citizen and burgess to the value of three hundred pounds; except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities: *which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men . . .*" 1 BLACKSTONE, COMMENTARIES *176 (emphasis added).

was made, by Gouverneur Morris to strike out "with regard to property" in the proposed clause, which would have given Congress the power to establish unlimited "uniform qualifications". 2 FARRAND 250. In response to that motion, Madison

"observed that the British Parliamt. possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties." *Id.* at 250.

Once again these remarks of Madison were addressed to a clause which, if enacted, would have given to Congress the power to establish, without limitation, any new "standing incapacity" which the majority of the moment thought desirable. It was Parliament's abuse of this power in its legislative enactments, not a single House's use of the power to judge individual qualifications, to which he was speaking. High on the list of those abuses in Madison's mind must have been the Parliamentary Test Act (30 Car. II st. 2, c. 1 (1678)) which had excluded Catholics as a group from Parliament.* It seems at least much more plausible that this precedent was the "lesson" to which Madison referred, not the *Wilkes Case* as Warren suggests and petitioners vehemently argue. WARREN 420 n.1; Br. 32 n.6, 35 *et seq.***

* That such statute was in the minds of the Framers is indicated by the prohibition contained in article VI, section 3, which was not contained in the draft reported out by the Committee on Detail, 2 *id.* at 188, but was introduced by Pinckney on August 20, *id.* at 342, ten days after Madison's speech.

** It should be noted that the expulsion of Wilkes was by the House of Commons which, acting alone, did *not* possess the power to "establish uniform qualifications for membership" and did not purport to act under any such power.

The provisions giving to each house the power to judge the qualifications of its members first appeared in a draft prepared by James Wilson, which was used in the Committee of Detail. 2 FARRAND 155. Gorham, a member of the Committee, had been quite active in the Massachusetts constitutional convention, which had adopted a provision limiting the power of a house of the legislature to judging those qualifications "as pointed out in the constitution", see p. 77-78, *supra*. Moreover, we have the testimony of another member of the committee, Edmund Randolph, that "the Constitution of Massachusetts was produced . . . in the grand Convention". 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 368 (1876). But the limitation contained in the Massachusetts constitution was not adopted, and the "judge qualifications" clause was reported out of the Committee of Detail in the form in which it now appears in the Constitution, 2 FARRAND 180, and adopted by the Convention "nem. con.", *id.* at 254.

If Madison had meant, as petitioners argue, to restrict the power to judge qualifications to those specified under the Constitution, and to deny the power to expel or exclude for reasons of unfitness or personal misconduct, it is strange that he did not speak to the point or suggest changes. Instead, he merely moved to insert the requirement of a two-thirds vote for expulsion.

The power to expel was first set forth in the draft prepared by Wilson, referred to above, in the following language:

"Each House may expel a Member, *but not a second Time for the same Offense.*" *Id.* at 156 (emphasis added).

By the time the clause was reported out by the Committee of Detail, the italicized language had been excised, *id.* at 180. Thus, the Committee of Detail considered and rejected yet another provision which would have limited the power of each house of Congress in a manner which would have repudiated in part the decision in the *Wilkes Case*.^{*} As reported out by the Committee of Detail, the only change made in the clause by the Convention was the insertion, on Madison's motion, of the phrase "with the concurrence of $\frac{2}{3}$ " between the words "may" and "expel". *Id.* at 254.^{**}

Thus the Convention considered and rejected at least two clauses (the Randolph restriction and Pennsylvania variation) and probably a third (the Massachusetts variant), which would have repudiated, in whole or in part, the English and American precedents, including the *Wilkes Case*. On the other hand, the acts of the Convention in rejecting provisions which would have given to Congress the power to create new "standing incapacities" do not, in our analysis, really bear on the question. Both Parliament and the colonial legislatures had treated the two powers as separate and distinct, and there is no indication that the Convention thought otherwise.

(d) *The Ratification Period.*

Given the long and widespread acceptance in Anglo-American law of the power of legislative bodies to judge

^{*} Neither "Wilkes" nor "*Wilkes Case*" appears in the index to *Farrand* (4 FARRAND 127, 226), although other names mentioned in the debates do, e.g., "Blackstone", "Bolingbroke", and "Bowdoin" (*id.* at 134-35). Therefore, to the extent that our present records are complete, Wilkes was not discussed in the Convention.

^{**} It seems much more plausible that Madison would have had the *Wilkes Case* in mind here than when considering Morris' motion, see pp. 83-84, *supra*, since Wilkes was "expelled" from the House of Commons. See p. 73, *supra*.

qualifications beyond the standing incapacities and to exclude or expel Members, it is not surprising that our review of the ratification proceedings in the several states, as set forth in Elliot's *Débates* and the leading public commentators, has not revealed any discussion of article I, section 5, or of the scope of the power to judge qualifications and to exclude or expel conferred thereby.* The power simply was not controversial.

2. *The Congressional Experience*

The above-mentioned power of the House of Commons and of the colonial and early state legislatures has been recognized and carried forward by both houses of the Congress. This experience has been summarized by Professor Chafee in his book *Free Speech in the United States*. There he discusses the two "extreme views" of the houses' powers to judge qualifications (i.e., either the House may "blackball" any member whom it chooses or the House has no power to judge any "qualifications" beyond those listed in the Constitution). He concludes:

"The arguments against both of the extreme views mentioned are so strong that the actual practice takes an intermediate ground. As to elected persons satisfying all the requirements in the Constitution, we are

* Petitioners' suggestion that the Constitution would not have been ratified unless the Framers limited the power of each House to judge qualifications is, in our view, erroneous. We have found no discussion of the issue either in the state ratification conventions or in the principal pamphleteers and commentators of the period. The examples cited by petitioners, Br. 46-57, in the conventions of New York, Pennsylvania and Virginia, were directed to other issues, namely the power to impose new standing incapacities. Significantly, the constitutions and practices of those states placed no limitation on the power of legislative bodies to adjudge an individual as unqualified because of his personal misconduct, although in Pennsylvania, he could not be expelled a second time for the same offense. See Appendix D at 28-32, 36-37, 40-43.

not forced to choose between giving the House absolute power to unseat whomever it dislikes, and giving the voters absolute power to seat whomever they elect. A third alternative has been adopted, fairly close to the second view. The constitutional qualifications ordinarily suffice; but Congress has rather cautiously imposed some additional tests by statute, and the House of Representatives or the Senate has probably added a very few more qualifications by established usage (a sort of legislative common law) to cover certain obvious cases of unfitness." CHAFEE 257.

In those cases of obvious unfitness, both houses have excluded or expelled members-elect or members.* Especially apt is the case of B. F. Whittemore. 1 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 464 (1907) [hereinafter Hinds]; 2 HINDS § 1273; Legislative Reference Service, *Precedents of the House of Representatives Relating to Exclusion, Expulsion and Censure* 48, 163-64 (1967) [hereinafter LRS]. Whittemore, while a Member of the House from South Carolina, was found by the House to have sold appointments to the military and naval academies. Before a vote could be taken on expulsion, Whittemore resigned. He was then re-elected, and the House excluded him by a vote of 130 to 24. *Ibid*; CONG. GLOBE, 41st Cong., 2d Sess. 4674 (1870).

Another case involving misuse of public office for personal gain is that of Frank L. Smith of Illinois. SENATE CASES 122-23. Smith was excluded from the Senate because it found that, while a member of a state agency regulating utilities, he accepted large campaign contributions from Samuel Insull and because Smith had made excessive campaign expenditures. The vote in favor of exclusion was 61 to 23. *Id.* at 123.

* Those cases are summarized in Appendix C hereto.

There are other instances of exclusion for actions evidencing moral turpitude. Senator William Lorimer of Illinois was excluded because the Senate found that members of the state legislature had been bribed to obtain his election. *Id.* at 100-01. William S. Vare of Pennsylvania was excluded from the Senate because the Senate found he had engaged in acts of corruption and fraud in the primary prior to his election to the Senate. *Id.* at 119-22. George Q. Cannon of the Territory of Utah was excluded because he was an admitted polygamist in open violation of a federal statute. 1 HINDS § 473; LRS 49. Brigham Roberts of the State of Utah was excluded because he had been convicted for violating the polygamy statute. 1 HINDS §§ 474-80; LRS 65-108. Victor Berger of Wisconsin, at the time of exclusion, had been convicted for sedition (6 CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 56-59 (1935) [hereinafter CANNON]; LRS 110-22), and subsequently, when his conviction was reversed on appeal and prosecution of the charges dropped, Mr. Berger was re-elected and admitted to the House (CHAFEE 168 n.30).

The most recent prior instance in which either house has considered excluding a single member-elect was the case of Theodore G. Bilbo of Mississippi. That was in 1947, when Mr. Powell was a Member of Congress. CONGRESSIONAL DIRECTORY, 80th Cong., 1st Sess. 164 (1947). Senator Bilbo, who had served 12 years in the Senate, was not sworn in at the opening of the 80th Congress, pending a Senate investigation of charges that he had accepted substantial gifts from war contractors and that he had attempted to prevent Negroes from voting in a primary. Senator Bilbo's credentials were tabled, and a final adjudication made unnecessary by his death. SENATE CASES 142-44.

Petitioners discuss at some length (Br. 73-97) selected instances in which a question arose as to the qualification

of a member of the House or Senate, for reasons other than age, citizenship and inhabitancy, and the legislative body decided that he should be seated. We agree that the precedents cited by petitioners are "important and persuasive" (Br. 73), but their significance lies neither in the decisions reached nor in the rhetoric in which the arguments were cloaked. They are important because in each instance the House or Senate took jurisdiction over the case, conducted an investigation and deliberated the issues. Such action clearly implies that were they to find the member not to be qualified, they alone had the power to act upon that finding.

Mr. Powell's awareness and affirmative acceptance of the power of each house to exclude a member-elect is underscored by his vote upon the resolution regarding the Mississippi Members in 1965. There, in response to a challenge to the entire Mississippi delegation's taking the oath, a resolution was offered which would have dismissed the challenge and seated the delegation. Mr. Powell voted against that resolution. 111 Cong. Rec. 24921 (1965).

3. This Court's References to the Constitutional Limitations Upon Qualifications for Membership in the Congress.

Petitioners contend that three decisions of this Court establish the proposition that the qualifications of article I, section 2—age, citizenship and inhabitancy—are exclusive. But this Court has never so held and its pronouncements tend to the opposite conclusion. Thus, although these three cases contain dicta which may suggest that Congress may lack the power to create new "standing incapacities" by statute, they do not even question the exclusive power of either house of Congress to adjudge an individual member to be unqualified by reason of his personal misconduct of the sort on which the House acted here.

First, *Newberry v. United States*, 256 U.S. 232, held that Congress lacked the power to regulate primary elections and reverse a conviction for conspiracy to violate a federal statute regulating expenditures by candidates in primary elections. In discussing the scope of the authority given Congress under section 4 of article I to make or alter state regulations regarding the time, places and manner of holding elections for Senators and Representatives, the Court quoted Hamilton's remarks in *The Federalist* emphasizing that Congress could not establish preferred classes (i.e., by establishing a uniform property qualification) for membership in either of its houses. But the Court also went on to point out that each house's power to judge qualifications gave Congress the "power to protect itself against corruption, fraud or other malign influences", *id.* at 258. That view was concurred in by Justices Pitney, Brandeis and Clarke, *id.* at 284-85, who thought the majority's conclusions as to lack of congressional power to regulate the primaries were inconsistent with the power of either house to judge the elections and qualifications of its members. *Ibid.*

Second, *United States v. Classic*, 313 U.S. 299, resolved that inconsistency by narrowly confining *Newberry* to its facts and holding that article I, section 4 granted Congress the power to regulate primary elections which were necessary steps in the choice of candidates for election to the Congress and which controlled that choice. Accordingly, the Court reversed a demurrer to an indictment under two federal civil rights acts for conspiracy to deprive qualified voters who voted in a primary election of their right to have their ballots cast for the candidates of their choice, to deprive candidates of their right to run for election to the Congress, and to have votes cast in their favor counted for them. In the course of its opinion, the

Court stated that the people's free choice of representatives in Congress was subject to the restrictions found in sections 2 and 4 of article I and "elsewhere in the Constitution". *Id.* at 316. But that statement is perfectly consistent with the view that each house has the power to adjudge an individual Member as unqualified in a particular case by reason of his misconduct pursuant to the Constitution's "judge qualifications" clause. This is confirmed by the fact that the Court in *Classic* referred with approval to the two houses' exercise of their respective power to judge elections, returns and qualifications. 313 U.S. at 319 n.3.

Third, *Bond v. Floyd*, *supra*, decided only that the exclusion of Julian Bond from the Georgia Legislature because of his political views violated the first and fourteenth amendments. In *Bond* the Court was exercising the federal power under the Supremacy Clause to invalidate state actions that infringe federal constitutional rights. The Court had no occasion to consider its power to pass on the actions of either house of Congress in judging the qualifications of its members, punishing them for misconduct, or expelling them. This Court noted, however, that both Madison and Hamilton had anticipated the oppressive effect on freedom of speech which would result if the legislature could pass judgment on a legislator's political views. It pointed out that Madison had opposed a proposal allowing Congress to "establish qualifications in general" and that he had said that qualifications "ought to be fixed by the Constitution" rather than "regulated" by the legislature as the British Parliament had done. It also noted Hamilton's comment in *The Federalist* that qualifications of the elected are to be found and fixed in the Constitution and are unalterable by the legislature. 385 U.S. at 135-36 n.13.

As we have already pointed out, those remarks of Madison were directed against the proposition that the Congress should have the power to pass laws establishing new general qualifications for membership in either house (*i.e.*, creating additional requirements, such as property ownership, over and above the three requirements of age, citizenship and inhabitancy). The same is true of Hamilton's remarks.* They were not adverting to the power of legislative bodies, well-recognized in the Colonies and early state legislatures, and continued by the Framers, to exclude or expel, on an individual basis, persons who were found unfit to sit because of personal misconduct. We recognize that *Bond* could be read as questioning the substantive power of either house of Congress to exclude a member-elect because of the exercise of his rights of free speech or religion, assuming for the moment that the Court would have power to consider such questions in a suit against the House or its Members.** But, unlike *Bond*, no such question is involved here, for the House's judgment of exclusion is not grounded on Mr. Powell's political or religious beliefs or on his exercise of any constitutional right. Accordingly, this Court's dictum in *Bond* does not govern this case, particularly since such a reading of *Bond* would conflict with other decisions of this Court which recognize the exclusive jurisdiction of each house to judge qualifications and to exclude or expel members for reasons other than age, citizenship and inhabitancy. See *Baker v. Carr*, 369 U.S. at 242 n.2 (Douglas, J., concurring); *Hannah v. Larche*, 363 U.S. 420, 444 n.21, 480-81; *Barry v. United States ex rel. Cunningham*, 279 U.S. at 613; *Reed v. County Comm'rs*, 277 U.S. at 388; *Jones v. Montague*, 194 U.S. at 153; *In re Chapman*, 166 U.S. at 668-70.

* See Appendix D at 59-60.

** But see Point I *supra*.

B. The Exclusion of Mr. Powell Was a Decision Equally Supported by the House's Power To Expel a Member Upon the Vote of Two-Thirds.

An alternative constitutional basis for the exclusion of Mr. Powell from the 90th Congress, adopted by Judge McGowan below, is the provision of article I, section 5, giving each house the power, upon the concurrence of two-thirds, to expel a Member. As noted above, in the early practice in the House of Commons, in particular the *Wilkes Case*, and in the colonial and early state legislatures, there was often no distinction made between exclusion and expulsion, and the word "expulsion" was often used to cover both situations.

Whatever limitations article I, section 2 arguably imposes upon the House's power to judge qualifications under article I, section 5, it has never been disputed that the authority of the House to expel on the vote of two-thirds is committed solely to its discretion. In particular, there can be no dispute that the expulsion power can be exercised for a host of reasons relating to past and current behavior. As this Court itself has stated: "The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U.S. at 669-70. Here the Select Committee's findings, expressly recited in House Resolution 278 and not contested by petitioners, support the judgment of the House that Mr. Powell's conduct was inconsistent with the trust and duties required for membership in that body.*

*The power to exclude a member upon grounds such as those present in this case finds its analogues in the power to expel a member and the power of impeachment. The power of the Senate to expel a member on similar grounds was early upheld in the case of *William Blount*, SENATE CASES 3, who, in 1797, was expelled and held to be unworthy of a continuance of his public trust in the Senate for having conspired with a British agent in a plan to seize Spanish Florida and Louisiana, and at least one member-elect of the House was expelled by a two-thirds vote for prior misconduct, instead of being excluded. See *John B. Clark*, 2 HINDS §1262, Appendix C.

The resolution excluding Mr. Powell was duly adopted by a vote in excess of two-thirds of the 434 Members—307 to 116. 113 CONG. REC. H1956-57 (daily ed. Mar. 1, 1967).^{*} Some Members, at least, considered exclusion and expulsion coextensive in the context at hand.^{**} While theoretically a Member may have to be seated before he may be expelled, such formality cannot be required here, because in practical effect the two amount to the same thing and the basic constitutional requirement for expulsion—a concurrence of two-thirds—was amply satisfied. And surely the broad perimeters of article I, section 5, giving the House control over the conduct of its internal affairs, make inappropriate any judicial questioning as to the technical regularity of the parliamentary procedure involved.

Petitioners' entire argument on the merits therefore rests upon the slimmest of reeds. At most their contention is that the action of the House was not absolutely regular. If the House had taken the technical step of voting to seat Mr. Powell and then immediately expelling

^{*} Some have suggested that a two-thirds vote would not have been forthcoming if the Speaker had not ruled that a majority vote would suffice. *E.g.*, Note, *The Power of a House of Congress To Judge the Qualifications of Its Members*, 81 HARV. L. REV. 673 n.1 (1968). Yet, such a suggestion can be supported only by speculations into the possible motivation and subjective purpose of each Member of the House who voted on the resolution. Such speculations cannot be undertaken or indulged. *United States v. O'Brien*, 391 U.S. at 383-86; *Barrenblatt v. United States*, 360 U.S. 109, 132-33; *Daniel v. Family Ins. Co.*, 336 U.S. 220; *Arizona v. California*, 283 U.S. 423, 455 and the cases there cited. The objective fact is that a two-thirds vote was forthcoming, and beyond that fact this Court cannot go. *See also* A. 94 (McGowan, J., concurring).

^{**} *See, e.g.*, 113 CONG. REC. H1942 (Mr. Curtis), H1944-45 (Mr. Celler) (daily ed. Mar. 1, 1967).

him by the two-thirds vote that in fact was accomplished, petitioners would have no argument left at all.

Respondents submit that the House has effectively met the stated requirement for expulsion and, if it has not, the deficiency in its resolution is merely technical and ministerial and hardly the occasion for judicial interference with the legislative branch in this case. As Judge McGowan stated, concurring in the court below,

"... Powell's cause of action for a judicially compelled seating thus boils down, in my view, to the narrow issue of whether a member found by his colleagues, after notice and opportunity for hearing, to have engaged in official misconduct must, because of the accidents of timing, be formally admitted before he can be either investigated or expelled. The sponsor of the motion to exclude stated on the floor that he was proceeding on the theory that the power to expel included the power to exclude, provided a $\frac{2}{3}$ vote was forthcoming. It was. Therefore, success for Mr. Powell on the merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade." (A. 92-93.) See also A. 96-99 (Leventhal, J., concurring).

C. Moreover, the Exclusion of Mr. Powell Did Not Infringe Any Other Constitutional Provision.

Petitioners contend that Mr. Powell was denied due process of law, that his exclusion was a bill of attainder, and (in their brief, but not in the complaint) that it was a discrimination based upon race (Br. 98-130). These contentions lack merit.

1. *Mr. Powell Was Not Denied Due Process of Law.*

Mr. Powell's due process claim is apparently limited to the contention that the procedures followed by the House and by the Select Committee were not proper.*

Even the scope of the procedural due process claim is not easy to fathom. Petitioners apparently maintain that Mr. Powell was not accorded (1) notice of the specific charges which, if proven, would justify exclusion or expulsion; (2) effective assistance of counsel; (3) the rights of confrontation and cross-examination of adverse witnesses; (4) a decision supported by substantial evidence; and (5) the right to assert his constitutional privilege against self-incrimination. (Br. 112-19)

On their face, those contentions are without substance. Mr. Powell chose on the express advice of counsel to limit his participation in the hearings before the Select Committee, *Hearings Before Select Committee* 255, on the sole and express ground that the Committee had no jurisdiction whatsoever to inquire into anything beyond his age, citizenship and inhabitancy. *Id.* at 60-64, 109-13. As his brief submitted at the close of the hearings makes clear, Mr. Powell was advised by counsel "for that reason, *and for that reason only* . . . not to participate in the hearings of the Committee which extend beyond such limitations". *Id.* at 255 (emphasis added).

* In the court below, Mr. Powell contended that he had been denied substantive due process because the standards of conduct by which the House judged him were not known to him beforehand. In other words, he claimed that he was not on sufficient notice that misuse of public funds, breach of public trust, contumacious evasion of lawful processes of the courts and failure to cooperate with investigations of his conduct authorized by the House might result in his exclusion or expulsion. Such a contention was without any merit, in view of the very substantial body of precedent in both Houses as a "sort of legislative common law" to cover obvious cases of unfitness, and we do not understand Mr. Powell to press that contention here. CHAFEE 257.

Mr. Powell's conduct before the Select Committee thus satisfied the strictest standards of waiver. *See Johnson v. Zerbst*, 304 U.S. 458, 464.

When the question of his seating was brought before the entire House, the body possessing the authority to adjudicate the question, Mr. Powell again chose to stay away.* Mr. Powell cannot now maintain that he was denied procedural due process with respect to proceedings in which he declined upon the advice of counsel to participate.

As Judge McGowan noted below:

"It is argued that the misconduct cannot be assumed because Powell was denied procedural due process by his colleagues in the investigation of his activities. But no one can read the record of the Select Committee's relationships with Powell without concluding that there was no serious purpose upon Powell's part to participate in the ascertainment of the facts. This was unquestionably due to his fundamental constitutional theory that he was accountable for his conduct only to his constituents. One cannot escape the impression that any procedural problems would have been resolved satisfactorily if there had been willingness to accept the relevance of the alleged misconduct to his continuance in the House." (A, 92 n.2). *See also* A. 99 (Leventhal, J.).

In any event, however, Mr. Powell was accorded rights consistent with the precedents of the House and Senate as well as with the arguably analogous judicial precedents.

* Mr. Powell could have participated in the debates on the Committee's Report and could even have had counsel present. *See* DESCHLER § 65.

The House is not bound by any particular set of procedures, since article I, section 5 gives it power to determine the rules of its proceedings. It has, however, attempted to accord Members, including Mr. Powell, such rights as are necessary to promote the ascertainment of truth. *See Hearings Before Select Committee* 30.

The rules of the House, as well as the Senate, followed in cases of contested elections, exclusions, and expulsions have been tailored to the nature of the case. Pure contested election cases generally resemble a civil trial* while exclusions and expulsions are often heard by investigating committees.** In exclusion and expulsion cases where the facts are extensively disputed, the privilege of cross-examination is often accorded.† Where the essential question is one of law or interpretation, on the other hand, a committee or the House may decide the question upon written statements and presentations.††

In this case, of course, the facts are not substantially in dispute. Mr. Powell never attempted to controvert the evidence of his improprieties and still does not.‡ Nevertheless, Mr. Powell received ample procedural rights from the Select Committee which investigated his qualifications.

* *E.g.*, *Wilson v. Vare*, SENATE CASES 119-22 (1927-29); *Jodoin v. Higgins*, 6 CANNON § 90 (1936).

** *E.g.*, *Benjamin Stark*, SENATE CASES 34 (1862); *B. F. Whittemore*, 1 HINDS § 464; 2 *id.* § 1273 (1870); *Reed Smoot*, SENATE CASES 97-98 (1907); *Wilson v. Vare*, *id.* at 119-22 (1927-29); *Frank L. Smith*, *id.* at 122-23 (1927-28).

† *E.g.*, *Phillip F. Thomas*, SENATE CASES 40 (1867-68); *William Lorimer*, *id.* at 100-01 (1912); *Theodore G. Bilbo*, *id.* at 142-44 (1947).

†† *E.g.*, *Albert Gallatin*, ANNALS OF CONGRESS, 3d Cong., 1st Sess. 60-62 (1794); *James Shields*, CONG. GLOBE, 30th Cong. 2d Sess. App. 332 (1894); *Waldo P. Johnson*, SENATE CASES 30-31 (1861-62).

‡ *See* p. 14 note *, *supra*.

Petitioners' reliance upon judicial precedents with respect to due process is misplaced. First, none of the cited cases dealt with each house's exercise of its constitutionally delegated power to judge the qualifications of its members, to determine the rules of its proceedings, and to expel members.

Second, even assuming that the cited precedents can be relied upon, petitioners fail to recognize that, as this Court has emphasized, due process is not a fixed and immutable concept, but rather depends upon the nature and purposes of the proceedings involved. *E.g.*, *Railway Clerks v. Employees Ass'n*, 380 U.S. 650, 667; *Cafeteria Workers, Local 473 v. McElroy*, 367 U.S. 886; *Hannah v. Larche*, 363 U.S. at 442. Where the proceeding is investigatory rather than adjudicatory, the full panoply of formal judicial procedures need not be followed. *Hannah v. Larche, supra*; *Anonymous v. Baker*, 360 U.S. 287; *In re Groban*, 352 U.S. 330.

It is clear that the proceedings of the Select Committee were investigatory, rather than adjudicatory, since the Select Committee's function was limited to reporting to the House "the results of its investigation and study, together with such recommendations as it deems advisable." H.R. Res. 1.

(a) Mr. Powell Had Ample Notice of the Charges Against Him.

In *Hannah v. Larche, supra*, the Civil Rights Commission, which, like the Select Committee, had no adjudicatory powers, summoned certain voting registrars and private citizens to appear in an investigation of alleged deprivations of Negro voting rights in Louisiana. No notice of the specific charges being investigated was given, but the persons summoned did have notice of the general nature of the

inquiry. 363 U.S. at 441 n.18. This Court held that notice sufficient. *Id.* at 441-42.

It follows that the notice given to Mr. Powell was more than adequate. See Chairman Celler's letters of February 1 and 10, and the Chief Counsel's letters of February 6 and 11, pp. 7, 11, *supra*. And there certainly was adequate notice prior to the consideration of the matter by the House as a whole, since the Select Committee made its recommendations to the House on the basis of detailed findings of fact. REPORT OF SELECT COMMITTEE 31-32.

(b) *Mr. Powell Was Accorded the Right to Counsel.*

The right to counsel may properly be denied in investigatory proceedings without running afoul of the dictates of due process. *Anonymous v. Baker, supra; In re Groban, supra.*

Nevertheless, Mr. Powell was given the right to counsel. Petitioners say, however, that they were denied the right to "effective" counsel because allegedly the Select Committee did not permit his attorneys to be heard (Br. 118). The plain fact is that every time Mr. Powell's counsel asked to be heard on any matter they were accorded reasonable opportunity to speak and to file briefs. See pp. 7-12, *supra*.

(c) *Mr. Powell Was Given the Right of Confrontation. While He Was Not Given the Right of Cross-Examination, the Record and Circumstances of This Case Clearly Show That He Was Not Thereby Prejudiced.*

In *Hannah v. Larche, supra*, this Court held that the Civil Rights Commission was not required to disclose the identity of complainants and was not required to grant the right to cross-examine. 363 U.S. 441-42.* One of the prece-

* See also *Martin v. Beto*, 260 F. Supp. 589 (S.D. Tex. 1966), *aff'd*, 397 F.2d 741 (5th Cir. 1968); *petition for cert. filed*, 37 U.S.L.W. 3252 (U.S. Nov. 12, 1968) (No. 732); *In re McClelland*, 260 F. Supp. 182 (S.D. Tex. 1966); *United States v. International Longshoremen's Ass'n*, 246 F. Supp. 849 (S.D.N.Y. 1964).

dents relied upon was the Senate proceeding with respect to the seating of John Smith of Ohio. *Id.* at 444 & n.21, 480-81.

The only authority specifically relied upon by petitioners with respect to this point, *Greene v. McElroy*, 360 U.S. 474, is totally inapposite. In *Greene*, all that was decided was that there was no statutory or administrative basis which authorized revocation of a security clearance without affording a hearing, including the right to confront and cross-examine adverse witnesses. That *Greene* was not based upon constitutional grounds was made clear by the subsequent decision of this Court in *Cafeteria Workers, Local 473 v. McElroy*, *supra*.*

Accordingly, the Select Committee was not constitutionally required either to disclose the identity of individuals who had supplied it with information or allow Mr. Powell the right to cross-examine adverse witnesses. Nevertheless, the Committee did not keep secret from Mr. Powell or his attorneys the identity of the witnesses who furnished testimony, and Mr. Powell and his attorneys made no effort to contest any of the testimony, or to avail themselves of the offer of the Committee to subpoena anyone whom Mr. Powell requested to testify. If he had requested the right to cross-examine a particular witness on a showing of need, one cannot escape the impression, as Judge Leventhal intimated, that the right would have been granted.

(d) *The Select Committee's Recommendations and the House's Action Are Supported by Substantial Evidence.*

Petitioners, as a further portion of their due process argument, contend that inadmissible hearsay was received

* See also *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 957; *Dixon v. Alabama Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930.

in evidence and apparently that the findings of the Select Committee and the action of the House were not supported by substantial evidence.

Petitioners' unspecified contention as to hearsay is frivolous. The admission of hearsay evidence before the Select Committee did not violate due process. *Cf. Costello v. United States*, 350 U.S. 359. Moreover, Mr. Powell's attorneys did not object to the admission of any evidence on hearsay grounds and thus have waived their right, if any, to object. 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940).

Petitioners' apparent general contention that the findings of the Select Committee were unsupported by substantial evidence is even less tenable. They do not point to any evidence in the *Hearings* that conflicts with the Committee's findings and do not suggest, even now, any evidence to rebut those findings.

(e) *Mr. Powell's Exclusion Was Not Punishment for Asserting His Constitutional Privilege Against Self-Incrimination.*

Petitioners also contend that the House's action is unconstitutional on the ground that it is punishment for Mr. Powell's assertion of his constitutional right to remain silent (Br. 118), citing *Slochower v. Board of Educ.*, 350 U.S. 551, a case involving the privilege against self-incrimination. Mr. Powell, however, never invoked the privilege against self-incrimination and did not refuse to testify on that ground. His argument is thus frivolous.

2. *House Resolution 278 Is Not a Bill of Attainder.*

Petitioners argue that House Resolution 278 is a bill of attainder (Br. 98-111), erroneously assuming that the doctrine of separation of powers assigns all adjudicatory

powers to the courts under article III. Each house of Congress, however, under article I, has expressly been given the power to *judge* the qualifications of its members as well as to punish its members for disorderly behavior and, with the concurrence of two-thirds, to expel a member. None of the cases cited by petitioners involved a legislature's exercise of these express judicial powers and are thus irrelevant. See *United States v. Brown*, 381 U.S. 437; *United States v. Lovett*, 328 U.S. 303; *Ex parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 277; cf. *United States v. O'Brien*, 391 U.S. at 383 n.30.*

The argument of petitioners was answered long ago by Alexander Hamilton in *The Federalist*. Referring to the analogous power of the Senate "as a court for the trial of impeachments" (THE FEDERALIST No. 65, at 439 (Cooke ed. 1961)), Hamilton defended the assignment of the impeachment power to the Senate (*id.* at 439-45), and specifically refuted the argument that the assignment of that power to the Senate was a deviation from the doctrine of separation of powers. He said,

"[It is objected] . . . that the provision in question confounds legislative and judiciary authorities in the same body; in violation of that important and well established maxim, which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place [Nos. 47-52], and has been shown to be entirely compatible with a partial

* A legislature's judging of the qualifications of a member-elect was not regarded as an act of attainder or an act of pain and penalties at the time the Constitution was drafted. Compare 1 BLACKSTONE, COMMENTARIES *162-63, *175-77 and 4 *id.* *259 (4th ed. 1770).

intermixture of those departments for special purposes, preserving them in the main distinct and unconnected. *This partial intermixture is even in some cases not only proper, but necessary to the mutual defense of the several members of the government, against each other.*" *Id.* No. 66, at 445 (emphasis added). See also CHAFEE 253; 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 742-45 (4th ed. Cooley 1873).

3. *Mr. Powell Was Not Excluded From the 90th Congress Because of His Race.*

Petitioners' contentions that the exclusion of Mr. Powell was motivated by racial prejudice are, as Judge McGowan noted below, "so purely conclusory in character as, under elementary pleading concepts, not to require a hearing on the merits" (A. 92).

More importantly, such contentions are patently unsupported, by inference or otherwise. Mr. Powell was excluded for the reasons stated in House Resolution 278, and for no other reasons. This Court cannot disregard those unchallenged reasons for the action of the House and probe for other concealed motivations that are claimed to have led each Member to vote as he did. For as this Court has emphasized on many occasions, the integrity of legislative, administrative, and judicial processes preclude probing "the mental processes" by which legislators and judges decide matters. *E.g., United States v. O'Brien*, 391 U.S. at 382-86; *Pierson v. Ray*, 386 U.S. at 554; *United States v. Morgan*, 313 U.S. 409, 422; *Arizona v. California*, 283 U.S. at 455; *Fletcher v. Peck*, 6 Cranch 87. The Speech or Debate Clause also squarely precludes such an inquiry.

Furthermore, petitioners' asserted constitutional bases—the thirteenth, fourteenth and fifteenth amendments—are frivolous as applied to the facts of this case.

First, "The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery." *Civil Rights Cases*, 109 U.S. 3, 24, or to the "badges and incidents of slavery", e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-43. The exclusion of Mr. Powell obviously has nothing to do with slavery, and since there is absolutely no showing of any intent to discriminate against Negroes as a class, there is no colorable "badge or incident of slavery" at issue.

Second, the fourteenth amendment has no application whatsoever to the federal government. And even if petitioners' reference to the fourteenth amendment is viewed as a reference to some sort of fifth amendment equal protection standard, they have failed to allege either a specific intent to discriminate against Negroes as a class or systematic discrimination against Negroes.

The statements, on and off the House floor, of a few Representatives opining that prejudice against Negroes was a major factor in the exclusion of Mr. Powell (Br. 125-27 n. 89, 127-29) do not establish petitioners' contention. As this Court knows: "[W]hat motivates one legislator to make a speech about a . . . [matter] . . . is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork". *United States v. O'Brien*, 391 U.S. at 384. Moreover, if this Court were to examine the legislative purpose or motive in excluding Mr. Powell, it would be obliged to consider not only the statements referred to by petitioners, but also the more authoritative *Report of the Select Committee*,

which makes clear that racial prejudice played no part in their deliberations. See *United States v. O'Brien*, 391 U.S. at 385.

Third, the fifteenth amendment prohibits only denials of the right to vote because of race, and since petitioners do not claim that House Resolution 278 expressly denies them the right to vote because of race, they do not even allege a violation of the fifteenth amendment. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301; *Gomillion v. Lightfoot*, 364 U.S. 339; *Terry v. Adams*, 345 U.S. 461; *Smith v. Allwright*, 321 U.S. 649.

POINT III

In Any Event, the Circumstances of This Case Do Not Present an Appropriate Occasion for a Federal Court To Exercise Whatever Discretionary Power It May Possess To Afford Relief.

The remedies petitioners seek in this action—injunction, mandamus, and declaratory judgment—are not available to a litigant simply because he asserts or even establishes an underlying right. Such remedies are given only as a matter of sound judicial discretion, where the circumstances are compelling. A determination to withhold such relief will not be set aside unless it constitutes an abuse of discretion. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148; *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111. This is especially true of petitioners' request for declaratory relief against the House, since

“The propriety of [such] relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of the federal judicial power.”

Public Service Comm'n v. Wykoff, 344 U.S. 237, 243 n.41 See also *Golden v. Zwickler* 37 U.S.L.W. 4185 (U.S. Mar. 4, 1969).

In the circumstances of this case, it was altogether appropriate for the courts below to decline to afford any of the relief requested.

As Judge Leventhal noted below,

"A court has a duty, in the sound exercise of discretion, to consider litigation seeking relief that raises problems of confrontation with a coordinate branch with an approach that will, wherever possible, confine relief narrowly." (A. 98)

Only circumstances of the most compelling necessity, or as Judge McGowan termed it, "the urgencies, in terms of simple justice" (A. 93-94 n.4), should induce a court to act otherwise in a case such as this. Here, there are no compelling necessities or "urgencies" that require the extraordinary relief petitioners seek.

First, petitioners have not challenged the accuracy of any of the findings of misconduct made by the Select Committee and have never proffered any evidence, either in the courts or in the House, to rebut those findings. Clearly, it was no abuse of discretion for the courts to refuse to come to the aid of a Congressman-elect whom both the Select Committee and the House itself found had improperly maintained his wife on his clerk-hire payroll, permitted and participated in improper expenditures of public funds for private purposes, refused to cooperate with Committees of the House in their lawful inquiries, and brought discredit to the House by his contumacious conduct toward the courts of New York.

Second, while the exclusion of Mr. Powell did temporarily deprive his constituents of representation in the House, that deprivation was, at least in part, perpetuated by Mr. Powell himself. After his exclusion in March of 1967, Mr. Powell was re-elected in April of 1967, but never again during the 90th Congress presented himself to represent his district.*

Third, upon the advice of counsel, Mr. Powell chose not to participate in the proceedings of the House, taking the position that neither the House nor the Select Committee had jurisdiction to inquire beyond his age, citizenship and inhabitancy. But surely, as Judge Leventhal noted below, the House had "legislative jurisdiction" to inquire into whether a Member-elect had committed acts justifying punishment or expulsion. And, pursuant to its power to determine the "Rules of its Proceedings", article I, section 5, it was authorized to conduct that inquiry prior to seating him. Against the backdrop of the potential confrontation with a coordinate branch and the courts' difficulty in molding meaningful relief, Mr. Powell's failure to participate in the proceedings led Judge Leventhal to conclude:

"... I do not think it mandatory for a court to consider and determine the constitutional issue as he has chosen to frame it, from an erroneous premise; and specifically, I think it proper to refrain from a full determination of the merits in a case where petitioner is seeking an extraordinary remedy yet has failed to invoke to the fullest extent the remedies and procedures available within the legislative branch." (A. 101)

For these reasons alone, the decision below should be affirmed.

* Of course, the claims asserted by Mr. Powell's constituents are unquestionably moot. See pp. 111-12 note * *infra*.

POINT IV

This Case May Now Be Dismissed As Moot.*

We believe that we have shown in the foregoing Points I, II and III that the courts below were correct in dismissing this action, and we submit that under those circumstances, affirmance of the dismissal would be an appropriate result, particularly since it would terminate the controversy in all its aspects. Nevertheless, we feel compelled to raise a suggestion of mootness because, wholly apart from the correctness of the result reached by the courts below, intervening events make it inappropriate now to grant the relief sought by petitioners. Time and the evolution of the political process have made this action moot and rendered the relief sought wholly academic and unnecessary. Since certiorari was granted, the 90th Congress has terminated, the 91st Congress has been convened and organized and Mr. Powell has been seated in the House of the 91st Congress. Petitioners themselves now concede, as they must, that "the remedial form of mandamus to the Speaker to require Petitioner's [Mr. Powell] seating is no longer required". Petitioners' Memorandum 16.

As against the House of the 90th Congress, however, they still seek a declaratory judgment on the constitutionality of its resolution of exclusion and an order against the Sergeant-at-Arms directing the payment of Mr. Powell's back salary. They also have asked in Petitioners' Memorandum for diverse mandatory, injunctive and declaratory relief against the House of the 91st Congress and certain of its officers, even though that body is not a party to this lawsuit and its action with respect to Mr. Powell was

* The argument in this Point IV supplements respondents' argument in their Memorandum on Mootness filed herein on January 10, 1969.

wholly independent from the action of the prior House.
See Petitioners' Memorandum 16.

Not one of these new claims for relief stands on any better footing than the original claims asserted in this action and in no way alters or affects the conclusion that this action is now moot.

A. Any Declaratory Judgment Against the House of the 90th Congress with Respect to the Exclusion of Mr. Powell Would Be Entirely Academic.

Even if declaratory relief would have been proper at an earlier stage of these proceedings, it would be inappropriate now. Such a judgment would only bind a party that is no longer in existence and would thus serve no useful purpose—it is no longer possible for Mr. Powell to be seated in the House of the 90th Congress. Under those circumstances, any declaratory judgment against the 90th Congress would be wholly empty and academic, and, hence, impermissible. As Professor Moore states:

“It is quite clear that the Declaratory Judgment Act is not to be used as a means of securing a judicial determination of moot questions. Such would be a determination of non-justiciable issues, and it is well settled that the Act is procedural only, and that its application is restricted to cases and controversies which are such in the constitutional sense.” 6A MOORE, *FEDERAL PRACTICE* ¶ 57.13, at 3071-72 (2d ed. 1966). *See also* *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227; *Public Service Comm'n v. Wycoff Co.*, *supra*.*

* It is clear that what standing, if any, the petitioners other than Mr. Powell may have had no longer exists. They are currently being represented in Congress, and there is no longer any way to enable them to be represented in the 90th Congress. *Flast*

The inability of this Court to decide moot questions is, of course, well established. In *Mills v. Green*, 159 U.S. 651, 653, for example, this Court wrote:

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

And only this month this Court emphasized that the declaratory judgment is limited to situations "in which there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment". *Golden v. Zwickler*, 37 U.S.L.W. at 4186 (U.S., Mar. 4, 1969), citing *Maryland Casualty Co. v. Pacific Oil Co.*, 312 U.S. 270, 273. In *Golden*, this Court held that the unlikelihood that Mr. Multer would again be a candidate for Congress pre-

v. Cohen, supra; Bond v. Floyd, 385 U.S. at 137 n. 14. Thus, their claims are totally moot. It should be noted, however, that all three judges below concluded that the claims of these citizens stood on no higher ground than the claims of Mr. Powell and were equally nonjusticiable and that the citizens of that district were constitutionally guaranteed the initial right to vote, not the right to have a particular representative be seated in Congress under all circumstances (A. 76-78, 91-101). Moreover, as this Court itself has recognized, the exercise of the power to exclude or expel does not violate the rights of the electors of such a member. *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, at 615-16.

cluded the necessary finding of "sufficient immediacy and reality" to support a declaratory judgment, even though first amendment rights were urged, and even though, the case was not moot when it was originally commenced.

Likewise, this case lacks the necessary "sufficient immediacy and reality" to support a declaratory judgment. Mr. Powell's period of exclusion has expired, he is sitting in the present House, and there is no more likelihood that he will again be excluded than there is that Mr. Multer will again be a candidate. Under these circumstances, the dismissal below must either stand or this case must be treated as moot.

B. Whatever Claim Mr. Powell Has with Respect to Back Salary Is Not Cognizable by This Court and Therefore in No Way Affects the Fact That This Action Is Moot.

Petitioners assert that Mr. Powell's claim for back salary, if any, prevents this case from being moot, and they now seek mandamus against the Sergeant-at-Arms of the House of the 91st Congress (even though he is not a party to this action) directing him to pay Mr. Powell that sum of money. Petitioners' Memorandum 16. We note at the outset that Mr. Powell's claim for back salary has always been incidental and subordinate to his now mooted demand for seating. It thus is wholly ancillary to the primary issues of this case and should not prevent this Court from dismissing this action as moot even if the claim itself could technically be resolved in this action.

In *Alejandrino v. Quezon*, 271 U.S. 528, discussed at pages 5-6 of Respondents' Memorandum on Mootness, this Court refused to entertain the salary claim of an individual suspended from the Philippine Senate because that claim was incidental to the mooted issue of suspension and was "not in itself a proper subject for determination as now presented". *Id.* at 535. Notwithstanding the distinction at-

Curtis) are not even Members of the present House. It is thus not only unrealistic to state that the action of the present House "continues" the action of the 90th Congress, it is simply erroneous.

Even the record on which the House of the 91st Congress based its action was different. To be sure, the findings of the Select Committee during the 90th Congress were discussed in the House during the January 3, 1969, debate on Mr. Powell's seating, 115 CONG. REC. H4 *et seq.* (daily ed. Jan. 3, 1969). But it is significant that, although Mr. Powell was then present in the House and could have participated in the debate, DESCHLER § 65, he did not in any way contest the basic accuracy of the Select Committee's findings or the procedure by which they were reached. His continued failure in the court of the House to attempt to rebut those findings in any way,* during a *de novo* consideration of his case, was part of the record on which the House reached its judgment. Such judgment was independent of the judgment reached by the predecessor House two years before, not a preordained and inexorable consequence of the prior action.

Based largely on their erroneous analysis that the action of the House of the 91st Congress "continued" the action of the House of the 90th Congress, petitioners ask this Court to enter declaratory relief against the 91st Congress. Petitioners' Memorandum 16. Petitioners, however, do not suggest how such relief can be granted.

The party against whom such an order would operate is not before this Court; the respondents here are the Members of the House of the 90th Congress, individually and as representatives of that House. The issues are also

* Of course, Mr. Powell has never, either before the Select Committee in the 90th Congress, before the 90th House itself, or in the courts suggested for a moment that those findings are erroneous. But see p. 14 note *, *supra*.

different. The issue in this case is whether a federal court can entertain an action against representative Members of the House of the 90th Congress to review the decision of that House to exclude Mr. Powell. The issue raised by the action of the House of the 91st Congress, which of course was not presented or considered below, is whether the House has power to admit and simultaneously punish a Member-elect for prior personal misconduct.* Petitioners cannot in effect begin a new lawsuit against an entirely different party (the House of the 91st Congress) and interject different issues at this stage of appellate review. Even if the proper parties were before it, this Court has no jurisdiction to hear such a claim (U.S. Const. art. III; 28 U.S.C. § 1251 (1964)), nor would it be exercising an appellate function since neither the House of the 91st Congress nor its actions were before the courts below.

* We submit, however, that the action taken by the 91st Congress constitutes a proper and lawful exercise of its constitutional power to "punish its Members for disorderly behavior". U.S. Const. art. I, § 5. Though rarely exercised, the power of the House to impose a fine is encompassed under that general power to punish. *See, e.g.,* 115 CONG. REC. H. 113 (daily ed. Jan. 3, 1969); *John L. McLaurin and Benjamin R. Tillman, SENATE CASES 94-97; 25 CONG. REC. 162 (1893).*

The power of the House to take away a Member's seniority can be justified pursuant to its power "to determine the Rules of its Proceedings", U.S. Const. art. I, §5. Even petitioners seem to concede as much, for their recently filed Memorandum does not even discuss the issue of Mr. Powell's seniority. *See also* Respondents' Memorandum on Mootness 7-8. No one has any right to seniority—as the recent action of the Democratic caucus of the House in stripping Congressman John R. Rarick of Louisiana of his seniority demonstrates. *See* 115 CONG. REC. E670-71 (daily ed. Jan. 30, 1969).

tempted by petitioners (Petitioners' Memorandum 16-17 note), the same is true here, for, as we have shown, Mr. Powell cannot successfully maintain a claim for back salary in this action, particularly against the Sergeant-at-Arms.*

Thus, as pointed out at pp. 63-64, *supra*, mandamus under 28 U.S.C. § 1361 (1964) can only be issued against officers and agents of the United States, and the Sergeant-at-Arms is not such an officer. As shown at pp. 64-66 *supra*, this Court cannot require the Sergeant-at-Arms to pay Mr. Powell in violation of his statutory authority and obligations to pay only Members, and it cannot order the Members to pass a resolution directing the Sergeant-at-Arms to pay him. Thus, whatever redress Mr. Powell may have in some court with respect to his back salary claim—such as a suit in the Court of Claims against the United States rather than the present defendants, see 28 U.S.C. § 1491 (1964), *Wilson v. United States*, 44 Ct. Cl. 428 (1909)—he has no claim which can be redressed in this suit against the House or its agents.**

* *Bond v. Floyd*, *supra*, is not to the contrary on the issue of mootness. There, it was not the existence of Mr. Bond's claim for salary which prompted this Court to decide the case on the merits. The determinative factors were: (1) the term from which Mr. Bond was excluded from the Georgia Legislature did not end until December 31, 1966, and accordingly had not expired when this Court decided the case on December 5, 1966; and (2) Bond had not been seated at the time of this Court's decision, and there was a substantial likelihood that the Georgia Legislature would again exclude him. Here, however, the 90th Congress has terminated, and Mr. Powell has been seated in the House of the 91st Congress.

** In a suit against the United States in the Court of Claims, some of the jurisdictional challenges raised (such as the Speech and Debate Clause) might not be applicable, while others (such as the claim that the propriety of the House's exclusion of Mr. Powell is a political question) might still require consideration. Mr. Powell has never indicated that he intends to commence such an action, and the defendant in such a possible action is not before this Court. That such defenses might again be raised, therefore, does not prevent this action from being moot. See *Bank of Marin v. England*, 385 U.S. 99.

We submit, therefore, that Mr. Powell's claim for back salary is untenable and in no way affects the fact that this action is now moot.

C. Mr. Powell's Claims Against the House of the 91st Congress Cannot Be Asserted in This Action.

Petitioners argue that the action taken by the House of the 91st Congress in some way "continued" the alleged unconstitutional action of the prior House. They even state that our contrary assertion "flies in the face of all reality", Petitioners' Memorandum 13. It is petitioners' argument, however, which has lost touch with reality.

The action taken by the House of the 91st Congress is not related to the action taken by the House of the 90th Congress. The present House seated Mr. Powell and, in addition, imposed a punishment. The House of the 90th Congress excluded Mr. Powell. What action, therefore, did the present House take which "continued" the action of the prior House?

Moreover, as the Constitution and decisions of this Court make abundantly clear, the 91st Congress is an entirely different body from the one which excluded Mr. Powell. The Constitution (article I, section 2) requires the election of Members of the House every two years with the result that "neither the House . . . nor its committees are continuing bodies". See *Gojack v. United States*, 384 U.S. 702, 706-07 n.4; *McGrain v. Daugherty*, 273 U.S. 135, 181; *Marshall v. Gordon*, 243 U.S. 521, 542; *Anderson v. Dunn*, 6 Wheat. 204, 231. Not only is the present House a different entity at law; it is a different entity in fact. Forty-one of the present Members of the House were not Members of the 90th Congress, see *N.Y. Times*, Nov. 8, 1968, at 26; col. 6, and, indeed, two of the Members of the 90th Congress who are respondents here (Messrs. Moore and

Conclusion

For the reasons stated, the judgment of the Court of Appeals should be affirmed, or in the alternative, that judgment should be vacated and the case remanded to the District Court with directions to dismiss on the ground that the case is now moot.

March 17, 1969.

Respectfully submitted,

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Continuation

For the reasons stated, the petition of the
 applicants should be affirmed, and the admission of the
 same should be granted, and the same registered in
 United Court with citation to the parties of the case.
 And this case is now closed.

MARCH 11, 1963

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article I, section 1:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, section 2, clauses 1, 2:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

"No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

Article I, section 2, clause 5:

"The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."

Article I, section 3, clause 3:

"No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

Article I, section 3, clauses 5, 6 and 7:

"The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

Article I, section 5:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

"Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

"Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

"Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting."

Article I, section 6:

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They

shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”

Article I, section 9, clause 3:

“No Bill of Attainder or ex post facto Law shall be passed.”

Article III, section 1:

“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

Article III, section 2:

“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a

State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”

Article IV, section 4:

“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

Article VI, clauses 2, 3:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all

executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Amendment XIII:

"SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SECTION 2. Congress shall have the power to enforce this article by appropriate legislation."

Amendment XIV:

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

""

"SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or

comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

“....

“SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”

Amendment XV:

“SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

“SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.”

Amendment XX:

“SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

“SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.”

United States Statutes

Act of March 3, 1875, ch. 137 [§ 1], 18 Stat. 470:

“That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between

citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."

Force Act, ch. 114, § 23, 16 Stat. 146 (1870):

"That whenever any person shall be defeated or deprived of his election to any office, except elector of President or Vice-President, representative or delegate in Congress, or member of a State legislature, by reason of the denial to any citizen or citizens who shall offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to

vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrently with the State courts, jurisdiction thereof so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States, and secured by this act."

Legislative Branch Appropriations Act, 1967,
P.L. 89-545, 80 Stat. 354, 358 (1966):

"... [T]he following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Legislative Branch for the fiscal year ending June 30, 1967, and for other purposes, namely:

"For compensation of Members (wherever used herein the term 'Member' shall include Members of the House of Representatives and the Resident Commissioner from Puerto Rico), \$14,148,975."

Legislative Branch Appropriation Act, 1968,
P.L. 90-57, 81 Stat. 127, 130 (1967):

"... [T]he following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Legislative Branch for the fiscal year ending June 30, 1968, and for other purposes, namely:

"For compensation of Members (wherever used herein the term 'Member' shall include Members of the House of Representatives and the Resident Commissioner from Puerto Rico), \$14,160,700."

Legislative Branch Appropriations Act, 1969,
P.L. 90-417, 82 Stat. 398, 401, 403 (1968):

"... [T]he following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the

Legislative Branch for the fiscal year ending June 30, 1969, and for other purposes, namely:

".....

"For compensation of Members (wherever used herein the term 'Member' shall include Members of the House of Representatives and the Resident Commissioner from Puerto Rico), \$14,160,700.

".....

"For miscellaneous items, exclusive of salaries unless specifically ordered by the House of Representatives, . . . \$8,000,000."

2 U.S.C. § 25:

"Oath of Speaker and Members of House"

"At the first session of Congress after every general election of Representatives; the oath of office shall be administered by any Member of the House of Representatives to the Speaker; and by the Speaker to all the Members present, and to the Clerk, previous to entering on any other business; and to the Members who afterward appear, previous to their taking their seats.

"The Clerk of the House of Representatives of the Eightieth and each succeeding Congress shall cause the oath of office to be printed, furnishing two copies to each Member who has taken the oath of office in accordance with law, which shall be subscribed in person by the Member who shall thereupon deliver them to the Clerk, one to be filed in the records of the House of Representatives, and the other to be recorded in the Journal of the House and in the Congressional Record; and such signed copies, or certified copies thereof, or of either of such records thereof, shall be admissible in evidence in any court of the United States, and shall be held conclusive proof of the fact that the signer duly took the oath of office in accordance with law."

2 U.S.C. § 31:

"Compensation of Members of Congress"

"The compensation of Senators, Representatives in Congress, and the Resident Commissioner from Puerto Rico shall be at the rate of \$30,000 per annum each. The compensation of the Speaker of the House of Representatives shall be at the rate of \$43,000 per annum. The compensation of the Majority Leader and the Minority Leader of the Senate and the Majority Leader and the Minority Leader of the House of Representatives shall be at the rate of \$35,000 per annum each."

2 U.S.C. § 34:

"Representatives' salaries payable monthly"

"Representatives-elect to Congress, whose credentials in due form of law have been duly filed with the Clerk of the House of Representatives, in accordance with the provisions of section 26 of this title, may receive their compensation monthly, from the beginning of their term until the beginning of the first session of each Congress, upon a certificate in the form now in use to be signed by the Clerk of the House, which certificate shall have the like force and effect as is given to the certificate of the Speaker."

2 U.S.C. § 35:

"Salaries payable monthly after taking oath"

"Each Member, after he has taken and subscribed the required oath, is entitled to receive his salary at the end of each month."

2 U.S.C. § 78:

"Same; duties"

"It shall be the duty of the Sergeant at Arms of the House of Representatives to attend the House during its sittings, to maintain order under the direction of the

Speaker, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk, execute the commands of the House and all processes issued by authority thereof, directed to him by the Speaker, keep the accounts for the pay and mileage of Members and Delegates, and pay them as provided by law."

2 U.S.C. § 80:

"Same; disbursement of compensation of Members"

"The moneys which have been, or may be, appropriated for the compensation and mileage of Members shall be paid at the Treasury on requisitions drawn by the Sergeant at Arms of the House of Representatives, and shall be kept, disbursed, and accounted for by him according to law, and he shall be a disbursing officer, but he shall not be entitled to any compensation additional to the salary fixed by law."

2 U.S.C. § 83:

"Same; tenure of office"

"Any person duly elected and qualified as Sergeant at Arms of the House of Representatives shall continue in said office until his successor is chosen and qualified, subject, however, to removal by the House of Representatives."

28 U.S.C. § 1331:

"Federal question; amount in controversy; costs"

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1344:

"Election Disputes"

"The district courts shall have original jurisdiction of any civil action to recover possession of any office, except

that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, wherein it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude:

"The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States."

28 U.S.C. § 1361:

"Action to compel an officer of the United States"

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. § 1491:

"Claims against United States generally; actions involving Tennessee Valley Authority"

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

28 U.S.C. § 2201:

"Creation of remedy"

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the

United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2202:

"Further relief"

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

28 U.S.C. § 2282:

*"Injunction against enforcement of Federal statute;
three-judge court required"*

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

31 U.S.C. § 671:

*"Appropriations for contingent expenses
of Congress; restrictions"*

"Appropriations made for contingent expenses of the House of Representatives or the Senate shall not be used for the payment of personal services except upon the express and specific authorization of the House or Senate in whose behalf such services are rendered. Nor shall such appropriations be used for any expenses not intimately and directly connected with the routine legislative business

of either House of Congress, and the General Accounting Office shall apply the provisions of this section in the settlement of the accounts of expenditures from said appropriations incurred for services or materials."

Federal Rules of Civil Procedure

Rule 19:

"JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION"

"(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

Rule 23:

"CLASS ACTIONS"

"(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims

or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

“(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair, or impede their ability to protect their interests; or

“(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

“(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.”

“(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

“(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

“(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

“(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

“(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.”

APPENDIX B

EXCERPTS FROM STATE CONSTITUTIONS AS OF 1787

Connecticut.

[Colonial charter; no provision.]

Delaware

DEL. CONST. art. 5 (1776): "... each house shall . . . judge of the qualifications and elections of its own members They may also severally expel any of their own members for misbehavior, but not a second time in the same sessions for the same offence, if reelected" 1 THORPE, FEDERAL AND STATE CONSTITUTIONS 563 (1909) [hereinafter THORPE].

Georgia

GA. CONST. (1777) [No provision].

Maryland

MD. CONST. arts. IX, X, XXI (1776): "That the House of Delegates shall judge of the elections and qualifications of Delegates."

"... They may expel any member, for a great misdemeanor, but not a second time for the same cause. . . ."

"That the Senate shall judge of the elections and qualifications of Senators." 3 THORPE 1692, 1694.

Massachusetts

MASS. CONST. part II, ch. I (1780): § II, art. IV. "The Senate shall be the final judge of the elections, returns and qualifications of their own members, as pointed out in the constitution; . . ."

§ III, art. X. "The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution" 3 THORPE 1897-99.

New Hampshire

N. H. CONST. part II (1784): "The Senate shall be final judges of the elections, returns, and qualifications of their own

New Jersey

members, as pointed out in this constitution. . . ." 4 THORPE 2460.

N. J. CONST. § V (1776): "That the Assembly, when met, shall have power . . . to be judges of the qualifications and elections of their own members" 5 THORPE 2595.

New York

N. Y. CONST. art. IX, XII (1777): "That the assembly, thus constituted, shall . . . be judges of their own members, . . . in like manner as the assemblies of the colony of New York of right formerly did; . . ."

" . . . that the senate shall, in like manner with the assembly, be the judges of its own members. . . ." 5 THORPE 2631-32.

North Carolina

N. C. CONST. § X (1776): "That the Senate and House of Commons, when met, shall each . . . be judges of the qualifications and elections of their members" 5 THORPE 2790.

Pennsylvania

PA. CONST. § 9 (1776): "The members of the house of representatives . . . shall have power to . . . judge of the elections and qualifications of their own members; they may expel a member, but not a second time for the same cause" 5 THORPE 3084-85.

Rhode Island

[Colonial charter; no provision.]

South Carolina

S. C. CONST. art. XVI (1778): "... the senate and house of representatives, respectively, shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly." 6 THORPE 3252.

Virginia

VA. CONST. (1776) [No provision.]

APPENDIX C

SUMMARY OF PRECEDENTS OF HOUSE OF REPRESENTATIVES AND
SENATE REGARDING EXCLUSION OR EXPULSION ON GROUNDS
OTHER THAN AGE, CITIZENSHIP OR INHABITANCY^b

I. HOUSE OF REPRESENTATIVES

A. *Exclusion Precedents.*(a) *Member excluded.*

(1) *John Young Brown* (Kentucky). Excluded without division from 40th Congress, 1st and 2d Sessions (1867-68), for giving aid and comfort to Confederacy during Civil War. 1 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 449-50 (1907) [hereinafter cited as "HINDS"]; Legislative Reference Service, *Precedents of the House of Representatives Relating to Exclusion, Expulsion and Censure* (defendants' Exhibit No. 1 in the District Court) 124-27 (1967) [hereinafter cited as "LRS"].

(2) *John D. Young* (Kentucky). Excluded without division from 40th Congress, 1st and 2d Sessions (1867-68) for giving aid to Confederacy during Civil War. 1 HINDS § 451; LRS 128.

(3) *John H. Christy* (Georgia). Not permitted to take oath of office in 40th Congress, 3d Session (1868-69), for giving aid, countenance, counsel and encouragement to the Confederacy. 1 HINDS § 459.

(4) *B. F. Whittemore* (South Carolina). Excluded by vote of 130 to 76 from 41st Congress, 2d Session (1870), for selling appointments to the military and naval academies. 1 HINDS § 464; 2 HINDS § 1273; LRS 48, 163-64.

(5) *George Q. Cannon* (Utah). Excluded (as Delegate from Territory of Utah) without division

from 47th Congress, 1st Session (1882), for admitted practicing of polygamy in open violation of polygamy statute. 1 HINDS § 473; LRS 49-63.

(6) *Brigham H. Roberts* (Utah). Excluded by vote of 268 to 50 from 56th Congress, 1st Session (1899-1900), for conviction for violation of polygamy statute and for disloyalty. 1 HINDS §§ 477-80; LRS 65-108.

(7) *Victor L. Berger* (Wisconsin). Excluded twice by votes of 311 to 1 and 330 to 6 from 66th Congress, 1st, 2d and 3d Sessions (1919-20), for disloyalty to the United States, for giving aid and comfort to a public enemy, for publications of expression hostile to the Government, and for conviction for sedition. 6 C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 56-59 (1935) [hereinafter cited as "CANNON"]; LRS 110-22. [When Berger's conviction was reversed and the prosecution of the charge dropped, he was, upon reelection, admitted to the House. 65 CONG. REC. 7 (1923).]

(b) *Exclusion of Member considered, but not adopted.*

(1) *William McCreery* (Maryland). Not expelled by vote of 89 to 18 from 10th Congress, 1st Session (1807), for alleged violation of state law requiring Member of Congress to be inhabitant of district at time of election and to have resided therein 12 months theretofore. State laws cannot impose additional qualifications for membership in the House. 1 HINDS § 414; LRS 17-18.

(2) *Samuel Marshall and Lyman Trumbull* (Illinois). Marshall not excluded without division from 34th Congress, 1st Session (1856), for violation of state law preventing state judges from running for other offices. State may not impose additional

qualifications for membership in the House. Trumbull's case became moot when he was elected to Senate, which considered exclusion but eventually admitted him. See II, A(b)(1), *infra*. 1 HINDS § 415; LRS 21.

(3) *William B. Stokes and James Mullins* (Tennessee). Not excluded from 40th Congress, 1st Session (1867), for alleged disloyalty during Civil War. Debate indicated that evidence was not sufficient to sustain the allegation. 1 HINDS § 444; LRS 24.

(4) *Kentucky Member Cases* (*James B. Beck, Thomas L. Jones, A. P. Grover, J. Proctor Knott, and L. S. Trimble*). Not excluded without division from 40th Congress, 1st Session (1867), for alleged disloyalty during Civil War. Four were exonerated of charges; the charges against the other (Trimble) were not proved. 1 HINDS §§ 448, 458; LRS 38-39.

(5) *Roderick R. Butler* (Tennessee). Not excluded from 40th Congress, 1st Session (1867), for alleged disloyalty during Civil War. Case made moot by passage of statute removing disabilities for office. 1 HINDS § 455; LRS 41.

(6) *Francis E. Shober* (North Carolina). Not excluded from 41st Congress, 1st Session (1869), for alleged disloyalty during Civil War. Case made moot by passage of statute removing disabilities for office. 1 HINDS § 456; LRS 42.

(7) *John C. Connor* (Texas). Not excluded without division from 41st Congress, 2d Session (1870), for allegedly beating Negro soldiers under his command and for allegedly bribing witnesses, suborning evidence, and perjuring himself before court

martial, which acquitted him of charge of beating. 1 HINDS § 465; LRS 44-46.

(8) *Lewis McKenzie* (Virginia). Not excluded from 41st Congress, 2d Session (1870), for alleged disloyalty during Civil War. Evidence held not to sustain allegation. 1 HINDS § 462; LRS 25.

(9) *S. R. Peters* (Kansas). Not excluded by vote of 106 to 20 from 48th Congress, 1st Session (1883-84), for violation of state law barring state judges from running for other offices. State may not impose additional qualifications for membership in the House. 1 HINDS § 417.

(10) *John W. Langley* (Kentucky). Exclusion from 69th Congress, 1st Session (1925-26); considered for conviction of conspiracy charge. House delayed admission while case was being appealed. Langley resigned after losing appeal, House never having voted on whether to exclude. 6 CANNON § 238; LRS 146.

(11) *Francis H. Shoemaker* (Minnesota). Not excluded by vote of 230 to 75 from 73d Congress, 1st Session (1933), for conviction for federal felony (sending defamatory matter through the mail). Committee on Elections never reported; the nature of the defamatory matter (derogatory remarks about a banker during Depression) and debate indicates that Committee's failure to report was probably a political decision. 77 CONG. REC. 73-74, 131-39 (1933); LRS 32-36.

B. *Expulsion Precedents.*

(a) *Members expelled.*

(1) *John B. Clark* (Missouri). Expelled by vote of 94 to 45 from 37th Congress, 1st Session (1861),

for alleged taking part in Civil War on side of Confederacy. 2 HINDS § 1262. ✓

(2) *John W. Reid* (Missouri). Expelled from 37th Congress, 2d Session (1861), for taking part in Civil War on side of Confederacy. 2 HINDS § 1261; CONG. GLOBE, 37th Cong., 2d Sess. 5 (1861).

(3) *Henry C. Burnett* (Kentucky). Expelled without division from 37th Congress, 2d Session (1861), for taking part in Civil War on side of Confederacy. 2 HINDS § 1261; CONG. GLOBE, 37th Cong., 2d Sess. 7-8 (1861).

(b) *Expulsion of Member considered, but not adopted.**

(1) *Matthew Lyon* (Vermont). Not expelled from 5th Congress, 1st Session (1799) for conviction of crime of sedition. 49 to 45 vote for expulsion failed for lack of two-thirds majority. 2 HINDS § 1284; LRS 140.

(2) *Orasmus B. Matteson* (New York). Not expelled from 35th Congress, 1st Session (1858) for acts committed in previous Congress. 2 HINDS § 1285; LRS 142.

(3) *James Brooks* (New York) and *Oakes Ames* (Massachusetts). Not expelled from 42d Congress, 3d Session (1872), for alleged taking of bribes and seeking to corrupt other members of Congress, respectively, in Credit Mobilier scandal. Censured, rather than expelled. 2 HINDS § 1286; LRS 148-51.

(4) *George Q. Cannon* (Utah). Not expelled from 43d Congress, 2d Session (1874), for practicing

* Upon several occasions, the House has also considered, but rejected, expulsion of a Member for causing personal injury to another Member. 2 HINDS §§ 1642-44, 1655-66; LRS 136-38.

polygamy (before enactment of statute making polygamy a crime). 1 HINDS §§ 468-70; LRS 28-30. [Excluded, however, from 47th Congress, 1st Session. See I, A (a)(5) *supra*.]

(5) *William S. King and John G. Shumaker*. Not expelled from 44th Congress, 1st Session (1874) for alleged bribery and perjury before House committee. 2 HINDS § 1283; LRS 143.

II. SENATE

A. *Exclusion Precedents.*

(a) *Member excluded.*

(1) *Philip F. Thomas* (Maryland). Excluded by vote of 27 to 20 from 40th Congress, 1st and 2d Sessions (1867-68), for giving aid to Confederacy during Civil War. SENATE SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS, SENATE COMMITTEE ON RULES AND ADMINISTRATION, SENATE ELECTION, EXPULSION AND CENSURE CASES, S. Doc. No. 71, 87th Cong., 2d Sess. 40 (1962) [hereinafter cited as "SENATE CASES"].

(2) *William Lorimer* (Illinois). Excluded by vote of 55 to 28 from 62d Congress, 2d Session (1912), for bribery of state legislators to obtain election to Senate. There were 102 days of hearings and more than 8,500 pages of transcript. (An earlier attempt to exclude Lorimer failed by a vote of 40 to 46.) SENATE CASES 100-01.

(3) *Frank L. Smith* (Illinois). Excluded by vote of 61 to 23 from 70th Congress, 1st Session (1927-28), for excessive campaign expenditures and acceptance of large campaign contributions from

utilities magnates over whom he was supposed to exercise supervision as member of state regulatory agency. SENATE CASES 122-23.

(4) *William S. Vare* (Pennsylvania). Excluded by vote of 58 to 22 from 70th and 71st Congresses (1927-29), for excessive campaign expenses in primary election and for evidence of fraud and corruption in that election. SENATE CASES 119-22.

(b) *Exclusion of Member considered but not adopted.*

(1) *John M. Niles* (Connecticut). Not excluded from 28th Congress, 1st Session (1844), for alleged mental incapacity. Select committee found him not to be of unsound mind. SENATE CASES 10.

(2) *Lyman Trumbull* (Illinois). Not excluded by vote of 35 to 8 from 34th Congress, 1st Session (1856), for violation of state law barring state judges from running for other offices. State may not impose additional qualifications for membership in the Senate. SENATE CASES 21.

(3) *Benjamin Stark* (Oregon). Not excluded by vote of 26 to 19 from 37th Congress, 2d Session (1862), for alleged disloyalty during Civil War. Seated, subject to investigation for possible expulsion; after investigation, motion of expulsion defeated by vote of 16 to 21. SENATE CASES 34.

(4) *Theodore G. Bilbo* (Mississippi). Not excluded from 80th Congress, 1st Session (1947), for alleged acceptance of gifts from war contractors and illegal intimidation of Negroes in Democratic primary. Allegations based on reports of Senate committees. Question of Bilbo's qualifications tabled until his physical condition permitted him to return to Senate. Bilbo's death made case moot. SENATE CASES 142-44.

B. *Expulsion Precedents.*

(a) *Member expelled.*

(1) *William Blount* (Tennessee). Expelled by vote of 25 to 1 from 5th Congress, 1st Session (1797), for engaging in scheme to seize Spanish Florida and Louisiana with British and Indian aid. SENATE CASES 3.

(2) *Jesse D. Bright* (Indiana). Expelled by vote of 32 to 14 from 37th Congress, 2d Session (1861-62), for writing letter of introduction to Jefferson Davis, the President of the Confederacy, for an acquaintance who wished to dispose of an improvement in firearms. SENATE CASES 30.

(3) *James M. Mason and Robert M. T. Hunter* (Virginia), *Thomas L. Clingman and Thomas Bragg* (North Carolina), *James Chestnut, Jr.* (South Carolina); *A. O. P. Nicholson* (Tennessee), *William K. Sebastian and Charles C. Mitchell* (Arkansas), and *John Hemphill and Louis T. Wigfall* (Texas). Expelled by vote of 32 to 10 from 37th Congress, 1st Session (1861), for having failed to appear in the Senate since the session began. SENATE CASES 28.

(4) *John C. Breckinridge* (Kentucky). Expelled by vote of 37 to 0 from 37th Congress, 2d Session (1861), for having joined the side of the Confederacy. SENATE CASES 29-30.

(5) *Waldo P. Johnson* (Missouri). Expelled by vote of 35 to 0 from 37th Congress, 2d Session (1861-62), for sympathy with, and participation in behalf of, the Confederacy in the Civil War. SENATE CASES 30-31.

(6) *Trusten Polk* (Missouri). Expelled by vote of 36 to 0 from 37th Congress, 2d Session 1861-62),

for expression of sympathy with, and participation in behalf of, the Confederacy in the Civil War. SENATE CASES 31.

(b) *Expulsion of Member considered, but not adopted.*

(1) *John Smith* (Ohio). Not expelled from 10th Congress, 1st Session (1807), for alleged involvement in Aaron Burr conspiracy. Committee found allegation true, but resolution failed to receive a two-thirds majority (19 to 10). SENATE CASES 4-5.

(2) *Benjamin Tappan* (Ohio). Not expelled from 28th Congress, 1st Session (1884), for revealing secret Senate documents to press. Censured by vote of 38 to 7. SENATE CASES 11-13.

(3) *Reed Smoot* (Utah). Not expelled by vote of 42 to 28 from 59th Congress 2d Session (1907), for alleged practicing of polygamy, for encouragement of polygamy by being apostle of Mormon Church, and other related allegations. Found not to be a polygamist, but being apostle of church encouraged polygamy. SENATE CASES 97-98.

(4) *Robert M. LaFollette* (Wisconsin). Not expelled from 65th Congress, 1st Session (1917-18), for speech of "disloyal nature". Vote was 50 to 21 against expulsion. SENATE CASES 110.

(5) *William Langer* (North Dakota). Not expelled by vote of 52 to 30 from 77th Congress, 1st and 2d Sessions (1941-42), for various alleged instances of moral turpitude after committee compiled 10 volumes of evidence and after Senate debated exclusion for 19 days. SENATE CASES 140-41.

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**Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

ADAM CLAYTON POWELL, JR., et al.,

Petitioners,

v.

JOHN W. McCORMACK, et al.,

Respondents.

APPENDIX D TO BRIEF FOR RESPONDENTS

**THE EXCLUSIVE CONSTITUTIONAL POWER OF EACH HOUSE OF
CONGRESS TO JUDGE THE QUALIFICATIONS OF ITS MEMBERS:
THE INTENT OF THE FRAMERS**

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**THE EXCLUSIVE CONSTITUTIONAL POWER OF EACH
HOUSE OF CONGRESS TO JUDGE THE QUALIFICATIONS OF
ITS MEMBERS: THE INTENT OF THE FRAMERS**

INTRODUCTION

This case presents to the Court the problem of interpreting the constitutional power of each house of Congress to judge the qualifications of its members and the related power to expel a member upon a two-thirds vote, both of which are granted by article I, section 5 of the Constitution. To determine the intent of the Framers, we have undertaken a review of the pertinent original sources and principal commentators, the results of which are set forth in this Appendix.

Our research has led us to the following conclusions:

1. That at the time the Constitution was drafted, there existed a widely accepted understanding, both in this country and in England, that the power of a legislative body to judge the qualifications of its members encompassed the power to exclude or expel a member on the ground that he was unfit to serve, because of his individual character or conduct, even though he met the general standards for membership imposed by law;

2. That the exercise of that power by the legislative body was final and was not reviewable by any court;

3. That the power of a single house of the legislature to judge the qualifications of its members was separate and distinct from the power of the entire legislature to create by statute "standing incapacities" which operate prospectively to exclude groups or classes of people from eligibility for membership;

4. That the Constitutional Convention, while apparently depriving Congress of the power to create new "standing incapacities", took no action which indicates an intent to limit the House and Senate respectively in their exercise of the power to judge the qualifications of their members, as that power was then understood, but instead deliberately rejected provisions which would have had that effect, thereby evincing an intent to adhere to the traditional interpretation of the "judge qualifications" language; and

5. That there is no basis for conjecturing that the Constitution containing the power to judge qualifications so interpreted would not have been ratified.

The material which has led us to these conclusions is set forth below. We begin with the background against which the Framers wrote. We first explore the English precedents which formed the body of prior law from which the American Colonies drew in setting up their colonial, state and then federal governments. We then examine the treatment given those precedents by the Framers, who were anxious both to conserve the best and to avoid repeating the worst of the English traditions. We then discuss the pertinent debates and actions of the Constitutional Convention, as illuminated by the historical background, and the relevant events of the ratification campaign.

I. THE STATE OF THE LAW AS OF 1787

A. THE ENGLISH PRACTICE.

The roots of the powers to judge qualifications and to exclude or expel a member extend far back into English history. They start when the House of Commons first began to recognize its own importance and to see the necessity of obtaining control over its own composition and internal proceedings. The Commons in that early period found that it had to wrest the power to judge the election of its members (which, as we shall show, included the power to judge the qualifications or capacity of its members) from the

Court of Chancery. That struggle culminated in 1604, when James I acquiesced in the Commons' position that they, and not the Chancellor, were the proper judges of the election of their members. TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 333 (11th ed. Plucknett 1960) [hereinafter TASWELL-LANGMEAD]. Thereafter,

"It was fully recognized as their exclusive right by the court of Exchequer Chamber in 1674, by the House of Lords in 1689, and also by the courts of law in 1680 and 1702. Their right was further recognized by the Act 7 & 8 William 3, c. 7, which declared that 'the last determination of the House of Commons of the right of election' is to be pursued." *Ibid.* (footnotes omitted).

A study of the history of the powers to judge qualifications and to exclude or expel a member, therefore, may best proceed by a review of the struggle between Parliament and the courts for jurisdiction over matters pertaining to elections; the manner in which the House of Commons exercised the power, with particular reference to the *Wilkes Case*, and the summary of the law conveniently provided by Blackstone.

1. *The Struggle for Jurisdiction.*

The authority of the English Parliament to judge the elections and qualifications of its members was neither asserted by nor attributed to that body at its inception in the reign of Edward I, which ended in 1307.* Throughout

* The earliest period ascribed for the emergence of the *communes* as a permanent and constitutionally required branch of Parliament is the reign of Edward I. 2 STUBBS, *CONSTITUTIONAL HISTORY OF ENGLAND* § 244, at 316 (1880) [hereinafter STUBBS]. There is some dispute over when the *communes* became a critical part of Parliament. See CAM, *Stubbs Seventy Years After*, in *LAW FINDERS AND LAW MAKERS IN MEDIEVAL ENGLAND* 188, 196-98 (1962); 3 STUBBS § 426; JOLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 349-51 (4th ed. 1961); cf. MAITLAND, *Introduction to Memoranda de Parlamento, 1305*, in *SELECTED HISTORICAL ESSAYS* 52 (Cam ed. 1957).

the fourteenth century, the knights of the shire and the burgesses (i.e., county and borough members) were summoned by writs of election, issued by and returnable to the King. The writs prescribed the qualifications* of those who could be elected, and the sheriff was responsible for assuring that those returned met the sometimes amorphous standards set forth in the writs. In the attainment of those standards, or in furtherance of his own or his patrons' interests, the sheriff often abused his influence. 3 STUBBS (§§ 419-20. Moreover, election to Parliament was viewed more as a burden than a privilege, both to the elected and to the electors who had to provide subsistence for their representatives.

"On any theory the conclusion is inevitable that the right of electing was not duly valued, that the duty of representation was in ordinary times viewed as a burden and not as a privilege; that there was much difficulty in finding duly qualified members, and that the only people who coveted the office were the lawyers who saw the advantage of combining the transaction of their clients' business in London with the right of receiving wages as knights of the shire at the same time. . . . [T]he power of the sheriff, and of the crown exercised through him, was almost uncontrolled in peaceful times, and in disturbed times the whole proceeding was at the mercy of faction." 3 STUBBS 440 (footnote omitted).

In an apparent attempt to restrain the exercise by the sheriffs of an undue influence on the composition of the

* The qualifications prescribed varied from king to king and parliament to parliament. On some occasions the writs specified that knights of the shire were limited to belted knights ("*gladiis cintos*"), but in the later part of the century that provision was omitted. 3 STUBBS 430. "In 1404 Henry IV caused considerable strife by excluding lawyers from his parliament, *id.* at 433, but the bar has had its revenge, for history has known that body as the "lack-learning parliament" ("*indoctum parliamentum*"). See 4 COKE, INSTITUTES *47; cf. JACOB, THE FIFTEENTH CENTURY 51 (1961).

lower house, an act was passed in 1406 requiring the writ of election to be returned to Chancery, and a statute in 1410 granted the judges of assize authority to inquire into undue returns. 3 STUBBS 457. But membership in the lower house remained unattractive throughout the reign of the Plantagenets (which ended in 1485), with the consequence that election disputes were infrequent. 3 STUBBS 454-55.

As the institution of Parliament began to assume more importance in the Tudor period (1485-1603), membership in the Commons became more attractive and, consequently, the results of elections were more often disputed, KIER, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN: 1485-1951*, at 140 (6th ed. 1961) [hereinafter KIER]. The Commons then began to assert jurisdiction over the disputes, and in 1553, in one of its first recorded cases, decided

“... that Alex. Nowell, being prebendary [*] in Westminster, and thereby having voice in the Convocation House, cannot be a member of this House; and so agreed by the House, and the Queen's writ to be directed for another burgess in that place.” 1 JOURNAL OF THE HOUSE OF COMMONS 27 (1803) [hereinafter C.J.]. See also KIER 151.

But the Chancery and the judges were not easily deposed from what had become their traditional jurisdiction over the elections and qualifications of members. In 1586, in connection with a dispute over the election of a member from Norfolk, the Chancellor informed the Commons that an election dispute was “a thing in truth impertinent for this House to deal withal.” *A COMPLEAT JOURNAL OF THE VOTES, SPEECHES AND DEBATES OF THE HOUSE OF LORDS AND HOUSE OF COMMONS THROUGHOUT THE WHOLE REIGN OF QUEEN ELIZABETH, OF GLORIOUS MEMORY* 393 (D'Ewes ed. 1693) [hereinafter D'EWEES JOURNALS]. The Commons re-

* A canon or member of the chapter of a cathedral or collegiate church who is the recipient of a stipend or “prebend” of maintenance, granted out of the estate of the church.

torted "that albeit they thought very reverently . . . of the said Lord Chancellor and Judges, and know them to be competent Judges in their places; yet in this case they took them not for Judges in Parliament in this House", *id.* at 398. In 1593, the Commons appointed a standing committee to "examine and make report of all such Cases touching the Elections and Returns of any of the Knights, Citizens, Burgesses and Barons of this House, and also all such Cases for privilege as in any wise may occur". *Id.* at 471; KIER 151.

The final round in the struggle between the Commons and the Chancery occurred in 1604, at the inception of the Stuart dynasty, when James I met the first of many rebuffs at the hands of that "body without a head", DAVIES, *THE EARLY STUARTS* 17 (1952) [hereinafter DAVIES]. Sir Francis Goodwin had been returned as the duly elected knight of the shire for the County of Bucks. However, Goodwin had been adjudged an outlaw some years earlier, and the proclamation summoning the Parliament had specifically commanded that no outlaws be elected. The Chancery ordered a new election, as a result of which Sir John Fortescue, a member of the King's Privy Council, was returned. The Commons investigated the matter and ordered Goodwin seated. James' experience with the moribund Scottish Parliament had not prepared him for dealing with the kind of independence (in his eyes, impertinence) which he was to find in the more viable English body. He therefore peremptorily informed the Commons that the determination of election disputes belonged to the Court of Chancery, and the Commons had no right to interfere. But the Commons was adamant. The dispute continued for some time, and finally James commanded the Commons, "as an absolute King", that they confer with a committee of judges and his Council over the matter. This ultimately led to a conference with the King at which he acknowledged that the Commons were the proper judge of elections, but

requested as a personal favor that neither Goodwin nor Fortescue be allowed to sit and that a new election be held.*

"The apparent compromise was in effect a victory for the Commons, whose right to decide upon the legality of returns, and the conduct of returning officers in making them, was thenceforth regularly claimed and exercised." TASWELL-LANGMEAD 333.

Moreover, this case together with other grievances prompted the Commons in 1604 to address the famous *Apology or Satisfaction concerning their Privileges* to the King, in which they reasserted their exclusive jurisdiction over election disputes:

"6thly, and lastly, We avouch that the House of Commons is the sole proper judge of Returns of all such Writs, and of the Election of all such Members as belong unto it, without which the freedom of election were not entire. And that the chancery, though a standing court under your maj. be to send out those writs, and receive the returns, and to preserve them, yet the same is done only for the use of the parl. Over which neither the chancery, nor any other court, ever had, or ought to have any manner of jurisdiction." 1 PARLIAMENTARY HISTORY OF ENGLAND 1033 (1813) [hereinafter PARL. HIST. ENG.]. See also *id.* at 1037.

2. *The Disclaimer of Jurisdiction by the Courts.*

Goodwin's Case was the last attempt by a monarch or his chancellor to interfere with the power or, as it came to be

* The discussion of *Goodwin's Case* is based upon GLANVILLE, REPORTS OF CERTAIN CASES DETERMINED AND ADJUDGED BY THE COMMONS IN PARLIAMENT lxxii-lxxxiii (1776) [hereinafter GLANVILLE]; 1 HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 299-302 (1881); and TASWELL-LANGMEAD 332-33. See also DAVIES 3; KIER 175. Glanville was Chairman of the Commons' Committee of Elections in 1623 and 1624, GLANVILLE 1, and the cases which he reported were those "concerning elections", a phrase which he interpreted, as indicated by his inclusion of *Goodwin's Case* and similar cases discussed below, as including questions as to the qualifications of those elected.

denominated, the privilege of the House of Commons to judge the elections, returns and qualifications of its members. In the 17th century, the common law courts likewise acquiesced in the exclusive jurisdiction of the Commons over elections and, in the absence of a clear statutory mandate, disclaimed the power to interfere.

An early indication of the courts' attitude is the decision in *Nevill v. Strode*. An action was brought against a sheriff for a false return in 1655, and £1500 damages were awarded to the plaintiff by the jury. However, before judgment, the Court of King's Bench adjourned the case into the House of Commons, as the only proper judges in cases concerning elections, because of the difficulty of determining whether such an action would lie.*

Barnardiston v. Soame, 6 How. St. Tr. 1063 (1674), merits more extensive discussion.** Sir Samuel Barnardiston claimed that Sir William Soame, while sheriff of Suffolk, "falsely and maliciously" made a double return on the writ for the election for a knight of the shire from Suffolk. The return stated that both Barnardiston and his opponent, Huntingtowre, were elected, whereas in fact Barnardiston had carried the election by 78 votes. As a result, Huntingtowre sat in the Commons until it was determined that Barnardiston and not Huntingtowre had been elected. Following a trial in the Court of King's Bench, Barnardiston recovered £1,000 in damages. On writ of

*No report of *Nevill's Case* has been found, but it was repeatedly referred to by the parties and the courts in subsequent election cases. A synopsis of it is found at 14 How. St. Tr. 717n. See also, the discussions of the case in the report in *Barnardiston v. Soame*, 6 How. St. Tr. 1063, 1069, 1086, 1104 (1674), from which it appears that *Nevill's Case* was never resolved.

**The case is also reported in 84 Eng. Rep. 769 and 89 Eng. Rep. 283, but the fullest account appears in STATE TRIALS. See also Sharwood, *Barnardiston v. Soame: A Restoration Drama*, 4 MELB. U. L. REV. 502 (1964).

error, the Court of the Exchequer Chamber* reversed, Lord Chief Justice North writing for a majority of six.

The "Arguments" of Judges Ellis and Atkins, the two judges who dissented and voted to affirm in the Exchequer Chamber, were delivered first. They are significant for the concessions which they make.

Thus Judge Ellis, in response to the objection that the matter in issue is one to be determined in Parliament, conceded that "as to the right of election [,] that is determinable there". He distinguished the case before him on the grounds that "1. Here is no action brought against a member. 2. No action brought for any thing done in parliament." *Id.* at 1073.

Similarly, Judge Atkins first canvassed the matters concerning Parliament as to which "the judges of Westminster-hall have in all times, and must meddle, and take cognizance of them". *Id.* at 1082. Under this head he listed such matters as (a) what constitutes a Parliament, for the purpose of determining the validity of alleged Acts of Parliament ("For though the king and parliament make acts, yet the courts in Westminster-hall put those acts in execution, and therefore must first satisfy themselves"); (b) when a Parliament begins, for the purpose of determining damages in a suit for expenses in attending Parliament; and (c) whether an individual is entitled to parliamentary privilege from arrest. *Id.* at 1082-83. Next he canvassed those matters which the courts have discretion to determine or to refer to Parliament for determination. Finally, he listed those matters "wherein the courts of Westminster-hall must not intermeddle, but the jurisdiction belongs to the parliament only." *Id.* at 1083. Judge Atkins' remarks as to those matters are particularly pertinent since they reflect his understanding that the predecessor of the Speech or Debate

*For the jurisdiction of this intermediate court of appeal, see 4 COKE, INSTITUTES *103-116, *119.

Clause* barred judicial interference with parliamentary disposition of questions pertaining to members. He pointed out that

"By the statute of 4 H.8.c.8, though all in that act that concerns one Richard Strode is a private act, yet there is one clause which is a general act, and is declaratory of the ancient law and custom of parliament, viz. It is enacted, 'That all suits, accusations, condemnations, executions, fines, amerciements, punishments, corrections, charges, and impositions, at any time from thenceforth, to be put or had upon any member, for any bill, speaking, reasoning, or declaring of any matter concerning the parliament, to be communed or treated of, be utterly void and of none effect.'" *Id.* at 1083.

"This is the reason", he said, relying upon Coke (2 COKE INSTITUTES *15):

"... that judges ought not to give any opinion of a matter of parliament, because it is not to be decided by the common laws used in other courts, but 'secundum legem et consuetudinem parliamenti.'" *Id.* at 1084.

Among the matters listed by Judge Atkins as those in which the courts "must not intermeddle" is the determination by the House of Commons of questions concerning election of their members. After a brief discussion of the history of that jurisdiction, Judge Atkins said,

"But we know that the House of Commons is now possessed of the jurisdiction of determining all questions concerning the election of their own members; so far at least, as is in order to their being admitted or excluded from sitting there." *Id.* at 1083-86.

Lord Chief Justice North, writing for a majority of six, noted that "it is admitted, that the Parliament is the only proper judicature to determine the right of election",

*Cf. *United States v. Johnson*, 383 U.S. 169, 182 n.13.

id. at 1098. He then adduced a number of reasons why this action would not lie, each of which is bottomed upon a desire to avoid a conflict between the courts and Parliament:

"I can see no other way to avoid consequences derogatory to the honour of the parliament, but to reject the action; and all other that shall relate either to the proceedings or privilege of parliament, as our predecessors have done." *Id.* at 1110.*

After the Revolution of 1688, Barnardiston brought his writ of error into the House of Lords, where on June 25, 1689, the decision of the Exchequer Chamber was affirmed. *Id.* at 1120.**

To be sure, these cases did not specifically present the issue whether the Commons had exclusive jurisdiction over disputes concerning the qualifications of their members. No judicial decision prior to the American Revolution has been found where that question was specifically in issue.† But in each of the opinions in *Barnardiston*, it is assumed — a *fortiori* — that the Commons had exclusive jurisdiction over "all questions concerning the election of their own members (in the language of Atkins, J., 6 How. St. Tr. 1086) in

*The report of the case in *State Trials* indicates that Lord Chief Justice Vaughan and Lord Chief Baron Turner, both deceased, agreed with the majority decision, 6 How. St. Tr. 1117. Presumably their opinions were obtained prior to their demise. ●

**To the same effect was the decision in *Onslow's Case*, 83 Eng. Rep. 561, 86 Eng. Rep. 294 (K.B. 1681). Thereafter it was provided by statute, 7 & 8 Wm. III, c. 7 (1695), that an action might be brought by the person grieved against a sheriff or other officer making a false return and double damages recovered. The statute was held to vest jurisdiction in the courts notwithstanding that the Commons were the only proper judges of the elections of their members "because it is certain that an Act of Parliament may give the Courts at Westminster a jurisdiction in cases of this nature, though they had none at common law, because the House of Commons is party to every Act and therefore is bound by it." *Myddleton v. Wynn*, 125 Eng. Rep. 1339, 1344 (Ex. Ch. 1745).

†But see *Bradlaugh v. Gossett*, 12 Q.B.D. 271 (1884), discussed p. 25 *infra*.

so far as those questions affected the right of a member-elect to sit. As *Goodwin's Case* illustrates, the term "judge the elections" was often used in the seventeenth and eighteenth centuries in a manner which necessarily included the power to judge the qualifications of the elected.* And the language used by Ellis ("the right of election [,] that is determinable [in the Commons]", 6 How. St. Tr. 1073) and North ("[P]arliament is the only proper judicature to determine the right of election," *id.* at 1098) is broad enough to support an inference that they assumed the Commons to be the sole judge of the qualifications of its members.

Furthermore, as will be shown, the Commons acted in a manner which implies that they at least believed themselves to be the exclusive arbiters of disputes over qualifications and that they did not believe the scope of their inquiry to be limited to the qualifications prescribed by statute. Moreover, the House of Lords, the pinnacle of the judiciary,** agreed.

Before turning to those precedents, it should be observed that the English courts in the seventeenth and eighteenth centuries drew a clear distinction between jurisdiction over disputes as to the election of members of parliament (which they steadfastly maintained that they lacked) and jurisdiction to determine the qualifications of an elector to vote (which they readily assumed). That distinction was first recognized in Holt's dissent in *Ashby v. White*, 92 Eng. Rep. 126 (Q.B.), *rev'd*, 1 Eng. Rep. 417 (H.L. 1703). Matthias Ashby brought an action against the Constables of the Bor-

*See, e.g., the debate in the *Wilkes Case* at 16 PARL. HIST. ENG. 594 (1813), quoted pp. 21-22 *infra*. In *Goodwin's Case*, pp. 6-7 *supra*, the language used was "judge of the Returns . . . and . . . Election" although the question was whether an outlaw was qualified to sit in the House. *Apology of 1604*, quoted p. 7 *supra*.

**The legislative and judicial functions of the Lords were not clearly distinguished until the end of the eighteenth century. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 201 (1961).

ough of Aylesbury for refusing to count his vote for the two burgesses for that borough who were elected to Parliament, although he was "a burgess and inhabitant of the borough aforesaid, and not receiving alms there or any where else then or before". Following a jury trial, the verdict was rendered for plaintiff. Thereafter, it was moved in arrest of judgment that the action was not maintainable and three of the four justices of the King's Bench before whom it was argued agreed. Chief Justice Holt, however, dissented and it was upon his opinion that the House of Lords reversed. In disposing of the objection that the judges could not pass upon the matter because it touched upon Parliament, Holt pointed out that the matter could never come in question in Parliament since the persons for whom plaintiff had voted had been elected and seated. Holt very carefully pointed out the distinction between jurisdiction over the right to vote and jurisdiction over the candidate's right of election:*

"... Was ever such a petition heard of in Parliament, as that a man was hindred of giving his vote, and praying them to give him remedy? The Parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.

"... If the House of Commons do determine this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections. . . ." 92 Eng. Rep. at 138.

The reasoning of the Lords is not set forth in the report of the appeal, but it may be inferred from their report of a

*In *Prideaux v. Morris*, 91 Eng. Rep. 430 (K.B. 1701), Chief Justice Holt had held that, since the courts of law lacked jurisdiction to determine the right of a candidate to sit in Parliament, even under the statute 7 & 8 Wm. III, c. 7 (1695) (see p. 11 note **, *supra*), a candidate's collateral attack upon the return in an action against a sheriff for damages for a false return was beyond the jurisdiction of the courts, where there had been no prior determination in Parliament. *Contra*, *Myddleton v. Wynn*, 125 Eng. Rep. 1339 (Ex. Ch. 1745).

be unworthy ever to serve as a Member of this House" because he had sought to induce a witness not to refer to certain matters pertaining to Sir Edmund during the witness's testimony before the House, 1 C.J. 917. And in 1641, at the inception of the "Long Parliament", the House resolved that "Mr. *Wm. Taylor* shall be expelled this House; be made incapable of ever being a Member of this House; and shall be forthwith committed a Prisoner to the *Tower*" for having "reflected" outside the House upon the proceedings against Strafford, at a time when even discussion of the business of the House outside its halls was considered a high breach of parliamentary privilege, 2 C.J. 158-59. In the same year, the House expelled a Mr. H. Benson and declared him "unfit and incapable ever to sit in Parliament, or to be a Member of this House hereafter" because he had abused the privileges of Parliament by selling "Protections" to various persons, thereby cloaking them with parliamentary immunity, 2 C.J. 301.

In 1642, as the conflict between Parliament and the King became more heated and the line dividing Parliament's men and King's men became more clearly drawn, the House expelled a number of its members (including Edward Hyde, later Earl of Clarendon) and held each of them "disabled to sit any longer a Member of this House, during this Parliament", for reasons which do not appear in the *Journals*, 2 C.J. 703, 704, 708, 711, 715, 716. In 1660, after the restoration of Charles II, the House expelled one Robert Wallop and held him "incapable of bearing any Office, or Place of publick Trust, in this Kingdom", apparently for having participated in the execution of Charles I, 8 C.J. 61.

Those cases demonstrate that Parliament exercised the power, not only to expel, but also to exclude particular members for the duration of that Parliament, even in advance of their seeking admission, for reasons beyond the "standing incapacities", the reason here being that they had been expelled. If Parliament had lacked the power to exclude for reasons other than the "standing incapacities",

the power to expel a member for misconduct would have been a meaningless one, since the expelled member could avoid its effect simply by being re-elected to fill the vacancy created by his expulsion.

So far as our research reveals, the first instance of an expelled member being re-elected to the Parliament from which he was expelled occurred in the case of Robert Walpole. In January 1712, the Commons committed Walpole (who subsequently became the first "prime minister" of England) to the Tower and expelled him from the House for receiving, while Secretary at War, kickbacks from "Two Contracts for Forage of her Majesty's Troops" 17 C.J. 28-30. Two months later, while still incarcerated in the Tower, Walpole was re-elected by the constituents of the Borough of Kings Lynn. The House resolved that he be excluded:

"... That *Robert Walpole* Esquire, having been, this session of Parliament, committed a Prisoner to the *Tower of London*, and expelled this House, for an high Breach of Trust in the Execution of his Office, and notorious Corruption, when Secretary at War, was, and is, incapable of being elected a Member to serve in this present Parliament" 17 C.J. 128.

The House then resolved that the re-election of Walpole was a "void Election" and ordered a new election held, *ibid.*, at which he was not re-elected. 1 COSTIN & WATSON, *THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS, 1660-1914*, at 208 (1952) [hereinafter COSTIN & WATSON].

(b) *The Wilkes Case.*

By far the most notorious expulsion case in the House of Commons prior to the American Revolution was that of John Wilkes. Its notoriety stemmed from an unusual coalescence of times, personalities and issues. The times were the late 1760's when the metropolis of London was experiencing labor pains in spawning both the in-

dustrial revolution and the radical movement which ultimately produced the parliamentary reform bill of 1832; when the price of bread in London had risen to 2d. a pound; and when the Scots were hated and the favorite courtier of young George III was Lord Bute, a Scottish peer. Thus, "the London crowds who in 1768 gaily smashed their opponents' windows and assaulted their property to shouts of 'Wilkes and Liberty!' may have been as filled with anger at the high price of bread and hatred of the Scots as with enthusiasm for the cause of John Wilkes." RUDÉ, *WILKES AND LIBERTY* 14 (1962) [hereinafter RUDÉ]. See generally *id.* at 1-16. Those were also the times when the American Colonies were resisting the mother country's attempts to require the colonials to pay part of the cost of the late war against the French. The Stamp Act had been passed in 1765 and repealed in 1766; the Townsend Acts were passed in 1767, and the colonies were vehemently resisting their enforcement. WATSON, *THE REIGN OF GEORGE III, 1760-1815*, at 106, 116, 127 (1960) [hereinafter WATSON].

It was in those times that "there burst on London that remarkable phenomenon, John Wilkes." RUDÉ 16. The well-educated second son of a prosperous businessman, he had the innate ability to convert a personal grievance into a transcendent constitutional issue; the wit to make members of the court party appear as buffoons, although in most instances they needed little help in that regard; the oratory to inflame the London mob; and the courage — or temerity — to make unrestrained attacks on the government and the Crown. He was, however, completely lacking in morals even when judged by the loose standards of his age, a man whom Benjamin Franklin described as "an outlaw and exile of bad personal character, not worth a farthing." *Id.* at 41 n.2. On the other hand, the court party, the insipid and obsequious products of bribery, favor and Newcastle's electioneering (see generally NAMIER, *ENGLAND IN THE AGE OF THE AMERICAN REVOLUTION* (2d ed. 1961)) were completely

lacking in experience or ability to cope with the problems epitomized by the rise of Wilkes.

The issues on which Wilkes rose to fame were two: the freedom of the subject to criticize the government and the legality of general warrants. Those same issues were commanding the attention of the American colonists during the same period, and that fact, together with the fact that Wilkes was in opposition to the king and the court party, resulted in the colonial leaders rallying to the support of Wilkes, partly in the hope that he would reciprocate.* POSTGATE, *THAT DEVIL WILKES* 173-78 (1929) [hereinafter POSTGATE].

In 1763, an information had been lodged against Wilkes charging him with seditious libel in connection with No. 45 of the *North Briton*, his anonymous opposition paper, in which he had described a statement in the King's speech to Parliament as a falsehood. The government proceeded under a general warrant (which was subsequently held illegal) to obtain evidence against Wilkes. After several preliminary hearings, but prior to his trial, Wilkes fled to Paris. Before his departure he had generated great support among the radical elements of the metropolis. He had also developed considerable backing from a more "respectable" element, the independent and opposition members of Parliament (many of whom defected from him when the government brought to light an obscene essay authored by him). He had also proven the government leaders to be inept bunglers. RUDÉ 22-36.

In 1768, Wilkes returned from his self-imposed exile, after scurrying around Europe just ahead of his continental creditors. Following an unsuccessful candidacy in the parliamentary elections in the City of London, he was elected as Member of Parliament for Middlesex.* He was

*By 1771, however, even the more radical American leaders became disillusioned with Wilkes and began increasingly to realize that they must stand alone against "British tyranny". MILLER, *ORIGINS OF THE AMERICAN REVOLUTION* 325 (1943).

then convicted in the court of King's Bench on the original charge of libel and sentenced to imprisonment. WATSON 129-31; *Proceedings in the Case of John Wilkes*, 19 How. St. Tr. 1075, 1124 (K.B. 1768).

While in prison and before taking the parliamentary oath, Wilkes petitioned the House of Commons, asserting that he was a member of the House and requesting that it grant him speedy redress of his grievances. 16 PARL. HIST. ENG. 533-35 (1813). Wilkes alleged, among other things, that Lord Mansfield had altered certain records in his case and that some of the testimony used against him in the libel action had been obtained by bribery. *Id.* at 533-35.

During the course of the debate on Wilkes' petition, Wilkes admitted having published derogatory comments about a letter written by Lord Weymouth to the justices. The Commons resolved that the comments constituted "an insolent, scandalous and seditious libel...." *Id.* at 534.

On February 3, 1769, the House resolved:

"... That John Wilkes, esq., a member of this House, who hath at the bar of this House confessed himself to be the author and publisher of what this House has resolved to be an insolent, scandalous, and seditious libel, and who has been convicted in the Court of King's Bench, of having printed and published a seditious libel, and three obscene and impious libels, and by the judgment of the said Court, has been sentenced to undergo 22 months imprisonment, and is now in execution under the said judgment, be *expelled* this House." *Id.* at 545 (emphasis added).

A new election was then ordered by the Commons, and on February 17, 1769, Wilkes was unanimously returned to the House by the electors of Middlesex. *Id.* at 577-78. The Commons then resolved,

"... That John Wilkes, esq., having been in this session of parliament, expelled this House, was, and is,

incapable of being elected a member to serve in this present parliament;..." 16 PARL. HIST. ENG. 580.

The election was declared void and a new election ordered, *Ibid.*

On March 17, 1769, the same scene was replayed, the electors of Middlesex having returned Wilkes unopposed. The election was again declared void and a new election ordered. *Id.* at 580-81.

On April 14, 1769, the Middlesex electors, to the further embarrassment of the Commons, again returned Wilkes. However, Henry Lawes Luttrell had run against Wilkes and, although his 296 votes were a poor second to Wilkes' 1,143, a motion was made that Luttrell ought to have been returned to parliament by the County of Middlesex. On May 8, 1769, after the Commons had considered the petitions of Luttrell and of freeholders from Middlesex with respect to the election, the motion was resolved in the affirmative. *Id.* at 583-90. In the course of the debate on that motion, it was pointed out that the Commons possessed exclusive jurisdiction in cases of election:

"That the House of Commons is the sole court of judicature in all cases of election. That this authority is derived from the first principles of our government; viz. the necessary independence of the three branches of the legislature [i.e., King, Lords and Commons]. Did any other body of men possess this power, members might be obtruded upon the House, and their resolutions might be influenced under colour of determining elections. They have therefore an exclusive jurisdiction, and must be in all these cases the dernier resort of justice. That the House in the present case is the competent judge of disability, and that their decision on it is final; that if in this or any other instance, its decisions were found to be attended with prejudice, the united branches of the legislature in their supreme and collective capacity, might interpose, and by pass-

conference with the lower house resulting from debates in the Commons over the Lords' decision:

"It was admitted, that the House of Commons exercise a jurisdiction, in determining the right of election of their own members; and though the time may be assigned, when that jurisdiction was exercised in another place, yet there has been a usage long enough to hinder that point from being drawn in question, especially after the sanction given to it, by the act made in the seventh year of king William's reign.

"But though it be true, that the merit of the election of a member, be a proper subject for the House of Commons to judge of, because they only can give the proper and most effectual remedy, by excluding the usurper, and giving possession of the place to him who has the right; yet there is a great difference between the right of the electors, and the right of the elected; the one is a temporary right to a place in parliament, *pro hac vice*, the other is a freehold, or a franchise: . . . a man has right to his freehold by the common law, and the law having annexed his right of voting to his freehold, it is of the nature of his freehold, and must depend upon it. The same law that gives him his right, must defend it for him, and any other power that will pretend to take away his right of voting, may as well pretend to take away the freehold, upon which it depends." *The Report of the Lords Committees*, 14 How. St. Tr. 778, 792 (1704).

3. *The Exercise of the Powers by the House of Commons.*

In the exercise of its exclusive jurisdiction over disputes concerning the qualifications of its members, the House of Commons often inquired into matters beyond those established by statute or *lex parliamenti* as prerequisites for membership. Almost invariably these concerned the character or conduct of the individual member. We have already

seen an instance of this in *Goodwin's Case*. Further examples merit discussion.

(a) *Early Cases.*

In 1623 and 1624* the Commons passed upon two disputes "concerning elections" which dealt with the qualifications of the elected. In *Steward's Case*, the committee on elections decided that "an alien born, only made denizen by letters patent, but not naturalized by act of parliament, is not, by law, eligible to serve as a burgess amongst the commons in parliament," GLANVILLE 120, 122. The House agreed and ordered a new election although it waited until the day before the session was to end before doing so, thereby allowing Steward to serve *de facto*, *id.* at 123.** In *Huddleston's Case*, the House again had presented to it the question whether an outlaw could sit. The committee considered the case at some length, searching the precedents, but reported the case to the House without recommending a decision. The House thereupon resolved that Huddleston "was a person eligible and well returned" and allowed him to take his seat. GLANVILLE, 124, 127.

On several occasions, the Commons coupled a resolution of expulsion with the determination that the member was, because of the expulsion, incapable of being re-elected, thereby judging his qualifications in advance. The first recorded example occurred in 1586, D'EWE'S JOURNALS 352. In 1628, the House committed Sir Edmund Sawyer to the Tower, expelled him from the House and declared "him to

*Glanville ascribes no particular dates to the cases considered by the Committee on Elections during his tenure as Chairman. But in the copy of his work which we have used (from the Library of Congress) there is a notation in ink, in a hand that appears to be from the eighteenth century, of a date for each case. March 10, 1623 is ascribed for *Steward's Case* and May 28, 1624 for *Huddleston's Case*. GLANVILLE 120, 124.

**Subsequently, by statute, 12 & 13 Wm. III, c. 2 (1700), it was enacted that aliens, even those naturalized, were ineligible to sit in the Commons. 1. BLACKSTONE, COMMENTARIES *163.

ing a law regulate such decisions for the future; but that nothing less could restrict their authority." 16 PARL. HIST. ENG. 594.

Although Wilkes had now effectively been excluded from the Commons and Luttrell seated instead, the debate on the propriety of the Commons' action did not cease. On January 25, 1770, a motion was made that the Commons, "in the exercise of its Judicature in Matters of Election, is bound to judge according to the Law of the Land and the known and established Law and Custom of Parliament, which is part thereof," *id.* at 786. The motion was passed only after it had been amended by adding that the expulsion and incapacity of Wilkes was in accord with the law of the land. *Id.* at 797-98.

On January 31, 1770, a second motion was proposed, but rejected; to the effect that only by law of Parliament, and not by resolution of the House of Commons, could a person be incapacitated from sitting in the Commons. Blackstone's speech during the course of the debate on that motion is particularly pertinent:

"Mr. Blackstone:

"Sir: I think it incumbent upon me to declare, that in my opinion, this House is competent in the case of elections, and that there is no appeal from its competence to the law of the land. There are cases in which the other House is competent: if the House of Lords in these laws should determine contrary to the law of the land, what is the remedy? and what is the remedy if the privy council, or the court of delegates should make such a determination? If such resolutions of the Lords, the Council and the Delegates are final, why not the resolutions of this House? As to the question whether expulsion does of itself imply incapacity, I have never answered it in the affirmative, neither have I ever declared to the contrary. I did not vote in the

question last year, and I shall not, by any vote that I may now give, be included in that question," 16 *PARL. HIST. ENG.* 802-03.

A similar motion was made in the House of Lords on February 2, 1770, *id.* at 814. It was acknowledged that had the resolution passed it would have been merely declaratory and would have had no legal effect upon the seating of Wilkes or Luttrell. Yet the House of Lords refused to interfere even that far with the jurisdiction of the Commons and the resolution was voted down, *id.* at 820. In its stead, the Lords resolved,

"That any Resolution of this House, directly or indirectly, impeaching a Judgment of the House of Commons, in a matter where their Jurisdiction is competent, final, and conclusive, would be a violation of the Constitutional Rights of the Commons, tends to make a breach between the two Houses of Parliament, and leads to a general confusion." *Id.* at 823-25.

Wilkes was re-elected a member of the next Parliament and allowed to sit. On five subsequent occasions, Wilkes and his supporters sought to have the resolutions expelling him and declaring him incapable of re-election for the duration of that Parliament expunged from the record. Finally, in 1782, after the fall of Lord North's ministry in the turmoil following the defeat of Yorktown, Wilkes succeeded in having the resolutions expunged from the record, in the language of Wilkes' motion, "as being subversive of the Rights of the whole Body of Electors of this Kingdom." 1 *COSTIN & WATSON* 235.

By this time, Wilkes and the Middlesex elections were no longer a *cause celebre*, and Wilkes had become unpopular with the groups which had previously constituted his power base. *POSTGATE* 223. Whatever interest the passage of this resolution aroused in England (in Wilkes himself it

stirred "a faint interest", *id.* at 237), it apparently went unnoticed in America.*

(c) *Subsequent Parliamentary Practice.*

Notwithstanding the broad language of Wilkes' motion to expunge from the record the resolutions expelling him, Parliament continued to exercise the power to judge mem-

*While we recognize that proving lack of knowledge of the existence of a fact is an impossible burden to meet, we think it significant that we have been unable to uncover any evidence that the resolution was a matter of general knowledge in America at the time of the 1787 Convention. There is no reference to it in several contemporary sources where one might expect to find some mention of it, if it were known. For example, neither the Marquis de Chastellux nor his translator mentions it, though both were traveling in America in 1782; both supported Wilkes; and both discussed Wilkes with Americans while on their respective journeys. 1 CHASTELLUX, *TRAVELS IN NORTH AMERICA IN THE YEARS 1780, 1781 and 1782*, at 6, 30, 354 (Grieve trans. 1963); 2 *id.* at 654.

Similarly, in the Report of the Pennsylvania Council of Censors in 1784, where both Wilkes' and Walpole's cases were discussed, and where those on one side of the issue being considered could have furthered their argument by citing the passage of this resolution, there is no mention of it. PROCEEDING RELATIVE TO . . . THE [PENNSYLVANIA] CONSTITUTIONS OF 1776 AND 1790, at 89 (1825), discussed pp. 43-44 *infra*. Indeed, there is no mention whatever of the *Wilkes Case* in the reported debates in the Federal Convention of 1787, 4 FARRAND, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 227 (rev. ed. 1966).

That the Wilkes resolution of 1782 may not have come to the attention of the colonists would not be surprising under the circumstances. At the time it was passed, the American coast was still under blockade by the British (the French fleet which had assisted the Americans at Yorktown was badly mauled by the British in April 1782) and the Royal troops continued to occupy New York and a number of other strategic points, 1 MORISON & COMMAGER, *GROWTH OF THE AMERICAN REPUBLIC* 227 (5th ed. 1962), factors which exacerbated the already poor communications between the warring nations. Nor is there any reason to believe that the fact of the resolution's passing would have been communicated to these shores after the conclusion of hostilities, but prior to the Constitutional Convention of 1787. The two best sources of information on such matters did not become available until after the turn of the century: the *Journals of the House of Commons* were not published until 1803, and Cobbett's *Parliamentary History* first appeared in 1813.

bers unqualified for reasons other than the "standing incapacities". See TASWELL-LANGMEAD 585-86.

In *Bradlaugh v. Gossett*, 12 Q.B.D. 271 (1884), an excluded member sought to enlist the aid of the courts in obtaining his seat, by bringing an action against the Sergeant-at-Arms of the House. Although the plaintiff, an avowed and vocal atheist (which was then equated with a total lack of morality and principle), had been excluded from the Commons on four occasions for reasons touching his religion (see ARNSTEIN, *THE BRADLAUGH CASE* 53-62, 73, 96, 114-15, 129 (1965)), the court held that it lacked the power to inquire into the circumstances surrounding and the reasons motivating the exclusions and, assuming for the purposes of argument that the exclusions were illegal, nevertheless held that it was without jurisdiction over the matter.

4. *Blackstone's Summary of the Law.*

The state of the law with respect to the power of the House of Commons was conveniently summarized by Blackstone, shortly before the American Revolution. He first listed the "standing incapacities" for membership in either house, enacted by statute and the law and custom of Parliament ("*lex et consuetudo parliamenti*"): "... no one shall sit or vote in either House, unless he be twenty-one years of age ... no member shall vote or sit in either House, till he hath in the presence of the House taken the oath of allegiance, supremacy, and abjuration ... no alien, even though he be naturalized, shall be capable of being a member of either house of Parliament." 1 BLACKSTONE, *COMMENTARIES** 162-63. Significantly, each of the prerequisites he lists are stated negatively.

In his fourth edition, Blackstone added a proviso reflecting the parliamentary decision in the *Wilkes Case* and his own investigation of the precedents supporting that decision:

"And there are not only these standing incapacities; but if any person is made a peer by the king, or elected

to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member: and this by the law and custom of parliament." 1 BLACKSTONE, COMMENTARIES *163 (4th ed. 1770 [and subsequent editions])^{*} (footnotes omitted).

He then turned specifically to the prerequisites for membership in the House of Commons. He again first listed, in negative form, those which were "standing restrictions or disqualifications" by statute or by the law and custom of Parliament. They covered age, citizenship, office, inhabitancy, property ownership and attainder of treason or felony. *Id.* at *175-76. Again he noted that for reasons beyond the "standing restrictions or disqualifications" a person could be disqualified:

"But, subject to these standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circumstances have forfeited that common right, and have been declared ineligible for that parliament by a vote of the house of commons, or for ever by an act of the legislature." *Id.* at *176 (emphasis in original; footnotes omitted).

Blackstone subjected the *Wilkes Case* to more extensive analysis in his pamphlet, *The Case of the Late Election for the County of Middlesex Considered on the Principles of the Constitution, and the Authorities of Law* [hereinafter *Middlesex Election*], which was reprinted, together with other papers, by Robert Bell, the publisher of the first

^{*}The first American edition of *Blackstone* was printed by Robert Bell in Philadelphia in 1771-72 (see James, *A List of Legal Treatises Printed in the British Colonies and the American States Before 1801*, in HARVARD LEGAL ESSAYS 159, 170 (1934)). It was taken from the fourth English edition (see 1 BLACKSTONE, COMMENTARIES xxv-xxvi (Hammond ed. 1890)), and therefore reflects the changes made by Blackstone in that edition. 1 BLACKSTONE, COMMENTARIES *163, *176 (1st American ed. 1771).

American edition of the *Commentaries*, in a compilation entitled *An Interesting Appendix to Sir William Blackstone's Commentaries on the Laws of England* (Philadelphia 1773). In this pamphlet Blackstone canvassed a large number of precedents, including most of those discussed above as well as a number of others, some of which he discussed in considerable detail.

The specific purpose of *Middlesex Election* was to demonstrate the historical support for the proposition that an expelled Member was incapable of being re-elected to the Parliament from which he had been expelled. Blackstone's research and reflection on that issue had led him to conclude that expulsion encompassed incapacity and therefore exclusion:

"EXPULSION clearly, *ex vi termini*, signifies a total, and not a partial, exclusion from the society or parliament from whence he is removed. If a member is excluded during pleasure, or for a certain time only, that is, properly speaking, a SUSPENSION, and not an EXPULSION: And the House themselves, as has been shown, have made the distinction in many cases, by making use of the word *suspended*, where they meant the exclusion to be temporary; that is, either during pleasure, or for the session, or till some end be attained. But when a member is *expelled*, he is not excluded from the meeting of that day, or of that session, but from *that* parliament; that is, from that body of which he is a member." *Middlesex Election* 70 (emphasis in original).

Moreover, Blackstone reasoned that the opposite view would relegate the expulsion power to the status of a vain and useless act, for if the electors could override the House's decision by simply re-electing the expelled member, "the determinations of the *house of commons*, which is a court of judicature, from whence there lies no appeal, would in fact become of less weight and authority than the lowest court now existing." *Id.* at 71.

Blackstone also pointed out in his pamphlet that the power of the House to declare a Member incapable of being elected to that Parliament was not, as Wilkes' supporters had argued, in effect a command to the electors as to how they should vote:

"THOUGH the house cannot, and God forbid they ever should, say whom the electors shall choose, yet they may declare who by law are *not to be chosen*. And by expelling a member, they declare, without saying more, that he is incapable of being elected for that parliament." *Id.* at 72.

Finally, Blackstone addressed himself to the argument, advanced by Wilkes' proponents, that if there were no appeal from a finding of incapacity by the House, the power to exclude a member would be arbitrary and lawless:

"THERE must, in all cases, ultimately be a power of judicature some where, without appeal; and wherever the constitution has thought proper to vest it, it is not supposed that it will, or ever can, be exercised against the express letter of the law." *Id.* at 117.

B. THE COLONIAL PRACTICE.

The embryonic legislatures of the English Colonies early asserted and continuously exercised the exclusive power to judge the qualifications of their members. Like Parliament, they did not believe themselves limited by the disqualifications for membership set forth either in the organic acts which brought them into existence or in parliamentary or colonial statutes. They considered the legislative body to have the inherent power to judge the broad capacity or fitness of its members.

The first legislative body to appear in the new world was the House of Burgesses of Virginia, and it provides an excellent illustration of the exercise of the power. It first convened on July 30, 1619, and on that date commenced to judge the qualifications and elections of its members. At

its first meeting, each burgess was called upon by name to take the Oath of Supremacy and enter the assembly, but at the name "Captain Warde" the speaker took exception, and Warde was asked to absent himself. The ground for the exception was that Warde did not possess a commission for his plantation from the Virginia Company. The Journal of the House records that "after much debate" the burgesses resolved that Captain Warde might take the oath and be seated provisionally, notwithstanding the infirmities of his position, because, among other things, he "had brought home a good quantity of fish to relieve the Colony by way of trade" and "the Commission for authorizing General Assembly admitteth of two Burgesses out of every plantation without restraints or exception."* He was admitted, conditioned on his obtaining a proper commission before the next general assembly. *JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1619-1659*, at 4 (1915).

Captain Warde having been seated, the next order of business raised by the House was whether the two burgesses from Captain Martin's plantation "should have any place in the Assembly." It was pointed out that, in the patent for his plantation, Captain Martin had a clause which exempted him from the provisions of the charter of the colony and the laws which might be made by the assembly. The two burgesses from Captain Martin's plantation were, after some discussion, excluded from the assembly until Captain Martin made his personal appearance before them. If Captain Martin "would be content to quitte & give over

* It is probable that the provision in the commission referred to was similar, if not identical, to the corresponding provision in the *Ordinances for Virginia* of 1621, 7 THORPE, *FEDERAL AND STATE CONSTITUTIONS* 3810 and n.a (1909) [hereinafter THORPE]:

"IV. THE other Council, more generally to be called by the Governor, once yearly, and no oftener, but for very extraordinary and important occasions, shall consist, for the present, of the said Council of State, and of two Burgesses out of every Town, Hundred, or other particular Plantation, to be respectively chosen by the Inhabitants: Which Council shall be called THE GENERAL ASSEMBLY" *Id.* at 3811.

that parte of his Patente, and . . . woulde submitte himselfe to the generall forme of governmente . . . then his Burgesses should be readmitted, otherwise they were utterly to be excluded. . . ." *Id.* at 4-5.

By 1692, the House of Burgesses appears to have established a more or less permanent committee for elections and privileges. The House convened on April 1, 1692, and on April 2, the "Committee for Elections and Priviledges" was appointed. On the same day it commenced its report, which was not completed until April 4. The *Journal* reports that the sheriffs of several counties had not made due returns of the writ for elections. The *Journal* does not reveal the particulars of the sheriffs' returns but, upon a reading of the report of the committee, the following resolution was adopted by the House:

"*Resolved nemine Contradicente* that the house of Burgesses are the Sole & only Judges of the Capacity or incapacity of their owne members, and that any Sherriff or other person whatsoever pretending to be a Judge of ye capacity or incapacity of any member of the House of Burgesses does thereby become guilty of a Breach of the Priveledges of the said House of Burgesses." *JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1659-1693, at 379-81 (1914).*

The recurrent struggles between the royal governors and the colonial assemblies are reflected in the address in 1736 by John Randolph, as speaker-elect of the House of Burgesses, to Governor Gooch. Randolph duly instructed the governor as to the privileges which the House of Burgesses claimed as its undoubted right, among which were

" . . . a Power over their own Members, that they may be answerable to no other Jurisdiction for any Thing done in the House; and a sole Right of determining all Questions concerning their own Elections, lest contrary Judgments, in the Courts of Law, might

thwart or destroy Theirs." JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1727-1740, at 242 (1910).

Further instances of the exercise by the House of Burgesses of its power to judge the elections and qualifications of its members are found in the *Journal* of the House's session of 1742. On May 21, the committee on privileges and elections reported that, upon investigation, it had found, contrary to the return of the writ of election, one Andrews had received more votes than the sitting member, Douglas. Douglas was declared not duly elected; Andrews was declared elected and the writ was amended accordingly.

On the next day, however, the House was informed that Andrews "has been guilty of many male [*sic*; mal-?] and scandalous Practices, in the Office of an Inspector," whereupon the information was referred to the committee on privileges and elections. On May 24, the chairman reported that the committee had found

"... That the said *Andrews*, whilst he was Inspector, was guilty of very enormous Misdemeanours and male Practices [*malpractices*?] in that Office, in Breach of his Oath, and the Duty of his said Office: And that he was by the Governor and Council turned out of the said Office, for the same; and ordered to be left out of the Commission of Peace for *Accomack* County: And had come to several Resolutions thereupon, which he read in his Place, and afterwards delivered in at the Table: Where the same were again read, and agreed to, by the House, as follows:

"*Resolved*, That the said Mr. *William Andrews* having been guilty of very enormous Misdemeanours and male Practices in the Office of an Inspector, in Breach of his Oath, and the Duty of his said Office, is unworthy to sit as a Member in this House.

"*Resolved*, That the said Mr. *Andrews*, for his said Misdemeanours, be expelled this House.

"Resolved, That the said Mr. *Andrews* be disabled to Sit and Vote, as a Member in this House, during this present General Assembly.

"Ordered, That an Address be made to the Governor, to order a new Writ to issue for Electing another Burgess to serve in this present General Assembly in the County of Accomack, in the Room of the said *William Andrews*, who is expelled this House. And that Mr. *Scarburgh* do attend the Governor with the said Address." JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1742-1747, at 31-33 (1909).

In the same session the House had found that one Henry Downs, a sitting member, had 21 years previously been convicted of the felony of stealing one sheep, whereupon the House, "*Nemine Contradicente*,"

"Resolved, That the said *Henry Downs* having been convicted of Felony and Theft, and punished, as aforesaid, is unworthy to sit as a Member in this House.

"Resolved, That the said *Henry Downs*, for the Causes aforesaid, be expelled this House.

"Resolved, That the said *Henry Downs* be disabled to Sit and Vote as a Member of this House, during the present General Assembly." *Id.* at 11.

These last two examples are denominated expulsions rather than exclusions, but it is clear that the grounds for the expulsions were matters which affected the qualifications of the member. They did not deal with misconduct in the capacity of a member and therefore were not disciplinary in the strict sense of the term. Moreover, the words "expel", "exclude" and "seclude" seem to have been used interchangeably in the 17th and 18th centuries without any sharp distinction between them. Thus, the resolution in the *Wilkes Case* in 1769 purported to "expel" Wilkes from the Commons even though he had never been sworn or seated in that Parliament, *supra*, pp. 20-21.

An incident which occurred in the New Jersey legislature, in 1771, indicates that the colonial legislatures considered the power to expel as stemming from the power to judge qualifications, not from their power to discipline their members for misconduct *qua* members. Governor William Franklin refused to seal a writ for a new election to fill a vacancy created when the New Jersey Assembly accepted the resignation of a member who had become insolvent. The Governor felt that to acknowledge the Assembly's power to accept resignations would result in allowing them to dissolve themselves through that means without the Governor's approval, "[b]ut the Assembly contend that in such a Case, if a Member does not resign, that they have the right to expel him, as being the sole Judges of the Qualifications of the Members." 10 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 307-08 (1886) [hereinafter NEW JERSEY ARCHIVES]. Further examples of the use of the word "expel" where we might today use the word "exclude" are found in connection with the 18th century state constitutions. See pp. 39-44 *infra*.

The New Jersey colony, particularly during the administration of Lord Cornbury, provides several illustrations of the struggles between the colonial assemblies and the royal governors over the power to judge qualifications. In 1705 proprietors of the Western Division of the Province of New Jersey petitioned the Lords Commissioners for Trade and Plantations, complaining among other things of the interference of Lord Cornbury in the assembly's power to judge the qualifications of its members. 3 NEW JERSEY ARCHIVES 88.* The proprietors' complaint prompted the Lords Commissioners to remonstrate to Lord Cornbury that

"We think, your Lordship will do well to leave the Determination about Election of Representatives to

* The governor had refused to allow three members a seat in the assembly until he was persuaded that they possessed the requisite amount of land, even though the assembly had reached a determination in their favor. 3 NEW JERSEY ARCHIVES 88, 90.

that House, and not to intermeddle therein, otherwise than by Issuing of Writs for any New Election." *Id.* at 100.

Subsequently, in 1707, Lord Cornbury himself complained to the Lords Commissioners that the assembly had expelled a member for refusing to take an oath which the assembly had no power to administer. *Id.* at 227. The Assembly replied,

"We expell'd that member for several contempts; for which we are not accountable to your excellency, nor no body else in this province: We might lawfully expel him; and if we had so thought fit, might have rendered him incapable of ever sitting in this house; and of this many precedents may be produced. We are the freeholders representatives; and how it's possible we should assume a negative voice at the election of ourselves, is what wants [but] little explanation to make it intelligible." *Id.* at 265-66.

The annals of the Rhode Island Colony provide further examples of the assertion and exercise by the legislative assembly of the power to exclude or expel members who were found to be unfit. In connection with the election of members to the Rhode Island assembly in 1650 it "was... ordered that in case any member, upon complaint and trial, should prove to be unfit to hold his seat, the Assembly might suspend him and choose another in his place." 1 ARNOLD, HISTORY OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 229-30 (1859). In 1683 the assembly exercised that power by expelling a member who contumaciously refused to appear in court upon being summoned.

"Voted: Whereas, Mr. John Warner was by the town of Warwick chosen to be a Deputy in this Assembly, and being from time to time called, and not in Courte appearing, and there haveing been presented to this Assembly such complaints against him, that the Assembly doe judge, and are well satisfied, he is an un-

fitt person to serve as a Deputy; and therefore see cause to expel him from acting in this present Assembly as a Deputy." Quoted in *id.* at 289.

A similar situation prevailed in Massachusetts where "the house was the sole judge of its membership. The representatives might 'settle order and purge' their house and 'make necessary orders for the due regulation thereof.' They expelled a member in 1715 for scandalous immoralities, and at times excluded military officers." SPENCER, *CONSTITUTIONAL CONFLICT IN PROVINCIAL MASSACHUSETTS* 51 (1905) (footnotes omitted).

And, at the inception of its session in 1726, the Massachusetts House of Representatives excluded a member who had been expelled from the House on three previous occasions:

"Whereas the Town of Tiverton have made Choice of Mr. Gershom Woodle to Represent them in this Great and General Court of Assembly; who has by his repeated Misdemeanours been three several times expelled, and still continues in an obstinate refusal of making an Acknowledgment of his Faults, whereby he has rendered himself unworthy to be a Member of the House of Representatives,

"Voted, That Mr. Speaker Issue out a Precept under his Hand and Seal, directed to the said Town of Tiverton, requiring them to Assemble the said Town, and choose a Representative in the room of the said Gershom Woodle, and make return thereof on or before the 13th day of June next." 7 *JOURNALS OF THE HOUSE OF REPRESENTATIVES OF MASSACHUSETTS* 4-5, 15, 68-69 (1926).

The examples discussed above indicate that the colonial legislatures, as had Parliament, often coupled resolutions of expulsion with a determination that the member expelled was "incapable" or "unfit" to be a member, either for the duration of the present legislature or for a longer period.

The records of the colony of North Carolina provide an example of the enforcement of that type of determination.

In 1758 the Assembly expelled Francis Brown, a member from Currituck County, for perjury, and rendered him "incapable to serve as a Member for any County or Town in this Province to Sit and Vote in this or any future Assembly thereof for the Reasons alleged in the above Report." 5 COLONIAL RECORDS OF NORTH CAROLINA 1058 (1887) [hereinafter N. C. RECORDS]. In 1760 Perquimons County reelected Brown, and the House on April 30 of that year, "on hearing Mr. Francis Brown regarding his Capacity to sit and vote in this present Assembly and fully and maturely having Considered the same—Resolved That the said Francis Brown is Incapable to sit and vote in this Present Assembly . . ." and ordered a new election. 6 N.C. RECORDS 375 (1888).

Brown was again re-elected, pursuant to the writ for a special election, and on November 12, 1760, the House again ordered a new writ of election issued, "as no person hath been duly returned Elected Representative for the said County in Virtue of the former." *Id.* at 474. He was later elected to the Assembly of 1761 and was then allowed to sit and vote. *Id.* at 662-63, 672-73.

The "constitutions" or charters of several of the colonies expressly provided that the assembly should possess the power to judge the qualifications of its members. Thus, paragraph 9 of the *Fundamental Orders of Connecticut* (1638) provided that the deputies could "examine their owne Elections, whether according to the order, and if they or the gretest p[a]rt of them find any election to be illegall they may seclud such for pr[e]sent fro[m] their meeting. . . ." 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 24 (Trumbull ed. 1850). The New York *Charter of Liberties and Privileges of 1683* provided,

"That the said representatives are the sole judges of the qualifications of their own members, and like-

wise of all undue elections, and may from time to time purge their house as they shall see occasion during the said sessions." 9 ENGLISH HISTORICAL DOCUMENTS 229 (Jensen ed. 1955).

William Penn's *Charter of Liberties of 1701* provided that

"there shall be an Assembly Yearly Chosen by the freeman thereof, to Consist of four persons out of each Country of most note for Virtue, Wisdom & Ability . . . [who] shall be Judges of the Qualifications and Elections of their own members . . ." 2 MINUTES OF THE PROVINCIAL COUNCIL OF PENNSYLVANIA 58 (1852).

Significantly, the New York Charter sets forth no qualifications or prerequisites for membership whatsoever, and the Pennsylvania charter refers only to being "of most note for Virtue, Wisdom & Ability", which seems to have been merely a precatory admonition to voters.

The foregoing discussion does not purport to contain a complete catalogue of the instances in which the colonial legislatures claimed and exercised the power to judge qualifications and to be "answerable to no other Jurisdiction for any Thing done in the House," JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1727-1740, at 242 (1910). But the illustrative examples set forth above confirm the conclusions of Professor Clarke, a student of the colonial legislatures, who conducted an exhaustive search of the colonial records in this country and in England, in both published and manuscript form. After discussing a number of additional examples of the exercise of the power to judge qualifications, Professor Clarke stated:

"It is thus apparent that the assembly not only claimed the right to judge of the commonly recognized qualifications, such as age, residence, and property holding, but placed further restrictions on the voters' rights of representation by the reaction of the assembly itself to the personal conduct of individual men.

The wide-spread acceptance of the belief that such power belonged to the legislature was as great in the colonies as in England." CLARKE, *PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES* 198 (1943) [hereinafter CLARKE].

Professor Clarke also concluded that the exercise of the power by the colonial legislatures was not infrequent:

"Records are not sufficiently complete to give accurate figures, but it seems reasonable to state that at least a hundred persons were expelled for one reason or another from the assemblies in the continental colonies." CLARKE 195 n. 58.*

* To the same effect, see GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES* 198-99 (1963) [hereinafter GREENE]:

"Cases of expulsion were much more rare [than reprimand], although a few occurred in every colony. The grounds for expulsion varied. The Virginia House of Burgesses expelled two members as early as 1652 and five in the eighteenth century for moral and religious reasons. It also expelled Thomas Osborne in 1736 and William Andrews in 1742 for committing misdemeanors as tobacco inspectors, Henry Downs in 1742 for having been convicted of a felony in Maryland twenty years earlier, William Clinch in 1757 for extorting a receipt and release from a debt from an old man, and William Ball in 1758 for counterfeiting treasury notes. The Georgia Commons ejected four members for writing a seditious letter at its inaugural session in 1755 and later in the same session a fifth for failing to take his seat. The South Carolina Commons excluded James Graeme in December 1733 for bringing an action against Speaker Paul Jenys, who had signed a warrant against Rowland Vaughn at the Commons' command. The North Carolina Lower House does not appear to have exercised the power of expulsion until 1757, when it ejected James Carter for misappropriating public funds. More famous was its expulsion of Harmon Husband, leader of the North Carolina Regulators, in December 1770. The period of exclusion after expulsion varied from colony to colony. The Georgia Commons excluded the members expelled in 1755 only until the end of the session. In the cases of Graeme in South Carolina and Osborne, Andrews, and Downs in Virginia, exclusion continued until the dissolution of the House that expelled them. Permanent exclusion occurred in Virginia in 1757 with William Clinch and in North Carolina in 1758 with the perjurer Francis Brown." (footnotes omitted).

C. THE EARLY STATE CONSTITUTIONS AND PRACTICES.

With this colonial background, it is hardly surprising to find that in nine of the 11 state constitutions adopted prior to the Constitutional Convention of 1787, the houses of the state legislatures were expressly, or by implication, given the jurisdiction to judge the elections and qualifications of their members.* The other two of those eleven state constitutions, like the colonial charters in the two remaining states, had no provision whatsoever on this matter, arguably indicating an intent not to depart from the Anglo-American practice described above.**

In only two of those constitutions—Massachusetts and New Hampshire—were provisions included which directly limited the assembly's power to judge qualifications. The Massachusetts constitution of 1780 provided that "the house of representatives shall be the judge of the returns, elections, and qualifications of its own members, *as pointed out in the constitution . . .*" MASS. CONST. ch. I, § III, art. V

* These were Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania and South Carolina. See 1 THORPE 563; 3 *id.* at 1692, 1694, 1897-99; 4 *id.* at 2460; 5 *id.* at 2595, 2631-32, 2790, 3084-85; 6 *id.* at 3252. The relevant portions of those constitutions are set forth in Appendix B to Respondents' Brief.

In all but South Carolina, the grant was express. In South Carolina, the constitution of 1778 granted to the two houses of the legislature the "privileges which have at any time been claimed or exercised" by the lower house of the colonial legislature, 6 THORPE 3252, among which was the power to judge elections and qualifications and to exclude or expel members, GREENE 193-98.

** The constitutions of Virginia and Georgia then in effect did not contain any provision regarding these powers, 7 THORPE 3812; 2 *id.* at 777, but the colonial legislatures of both states had traditionally judged qualifications and excluded or expelled members, see pp. 28-32 *supra*; GREENE 198, and the legislature of Virginia continued to do so after the Declaration of Independence, see p. 44 *infra*.

Connecticut and Rhode Island, on the other hand, did not adopt constitutions until 1818 and 1842, respectively, but continued to operate under their colonial charters, 1 THORPE 536; 6 *id.* at 3222. Rhode Island's colonial legislature had exercised those powers prior to the Revolution, see pp. 34-35 *supra*, and Connecticut had provided for "seclusion" of a member under its *Fundamental Orders* of 1638, see p. 36 *supra*.

(1780) (emphasis added). The constitution of New Hampshire, which appears to have been copied from Massachusetts, contains language substantially similar to that of Massachusetts. N. H. CONST. part. II (1784). As can be seen from this language, the lower houses of Massachusetts and New Hampshire, in judging the qualifications of their elected members, were restricted to those specifically enumerated in their constitutions.*

While we do not have any legislative history regarding the New Hampshire constitution,** what legislative history we have† concerning the drafting of the Massachusetts constitution indicates that the inclusion of this language was a deliberate and conscious act on the part of the convention, and raises the implication that at least some of its members then shared the understanding that, absent the express limitation italicized above, the provision would have empowered each house of the legislature to go beyond the qualifications set forth in the constitution in judging the fitness of its members. Such an interpretation is, as we have seen, consistent with prior colonial practice.

The proceedings of the Massachusetts Convention also provide a further indication of the understanding in the

* It should also be noted that the Massachusetts constitution provided, "And no person shall ever be admitted to hold a seat in the legislature . . . who shall, in the due course of law, have been convicted of bribery or corruption in obtaining an election or appointment." 3 THORPE 1910. New Hampshire had a substantially similar provision. 4 *id.* at 2470.

** See 9 NEW HAMPSHIRE STATE PAPERS 842 (1875).

† The journal of the convention at which the Massachusetts Constitution was drafted is, like most eighteenth-century journals, simply a record of motions made and their disposition. JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT OF THE STATE OF MASSACHUSETTS BAY (1832) (hereinafter MASS. JOURNAL). Accordingly we have no record of the debates and thus no express indication of the motivation behind the insertion of the italicized language. But the journal does reveal that that language was added by the convention to a clause submitted to it by a drafting committee, *id.* at 147. Similar language had earlier been added by the convention to a corresponding provision with respect to the Senate, *id.* at 73.

eighteenth century of the relationship between the power to expel and the power to judge qualifications. On February 8, 1780, the convention "*Voted*, that the Committee, upon the powers and privileges of the House of Representatives, take into consideration the privileges of the Senate, with their power of expelling their own members." MASS. JOURNAL 88. Neither in the draft then before the convention, *id.* at 199-201, nor in the constitution as adopted, *id.* at 230-33, was any express power given to the Senate (or the House) to expel a member. But in the draft then being considered, the Senate had been given the power to judge qualifications whereas the House had not, *id.* at 200, 201-04. Subsequently (on February 28), a drafting committee reported a new clause concerning privileges of the House which gave to it the power to judge the qualifications of its members. *Id.* at 147. As amended (to add the italicized language) that provision was adopted. *Id.* at 148. Thus the quoted resolution, suggesting inclusion of the power to expel, would seem to have had reference to the power to judge qualifications.

The early constitutions of three other states—Pennsylvania, Delaware and Maryland—contained restrictions on the power to expel, which arguably had the effect of limiting the exercise of the power to judge qualifications. The Pennsylvania Constitution of 1776 provided that "[t]he members of the house of representatives . . . shall have power to . . . judge of the elections and qualifications of their own members; they may expel a member, but not a second time for the same cause . . .", PENN. CONST. ch. II, § 9 (1776). Similarly, the Constitution of Delaware provided that "... each house shall . . . judge of the qualifications and elections of its own members. . . . They may also severally expel any of their own members for misbehavior, but not a second time in the same sessions for the same offense, if re-elected . . .", DEL. CONST. art. 5 (1776). The Maryland

constitution contained substantially the same language, MD. CONST. art. X (1776).*

The journals of the Pennsylvania, Delaware and Maryland conventions do not give us any indication of the objective sought to be achieved by permitting only one expulsion for the same reason. PROCEEDINGS RELATIVE TO...THE [PENNSYLVANIA] CONSTITUTIONS OF 1776 AND 1790 (1825) [hereinafter PENN. CONST. PROC.]; PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE, 1776, at 26 (1927); PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND (1836). But it seems reasonable to surmise that it was the intent of the framers of those constitutions to prevent the legislatures from disqualifying an expelled member from re-election, as Parliament and the colonial legislatures had done. In doing so, they may well have had in mind the *Wilkes Case*, which was at that time relatively recent.

The eleven years between the Declaration of Independence and the 1787 Philadelphia Convention were turbulent ones, and fewer of the records of legislative proceedings during that period have been published. We have found reference to only two cases in that period considering the power to judge qualifications.

One of these cases is of particular interest because of the attention given it by the first Pennsylvania Council of Censors and because of its propinquity, both geographically and chronologically, to the Constitutional Convention. The Pennsylvania Council of Censors was a short-lived in-

* A similar provision was written into the first constitution adopted by Connecticut. CONN. CONST. art. III, § 8 (1818). The journal of the Connecticut convention reflects no debates on that provision, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF CONNECTICUT, 1818 (1873). The Connecticut Constitution of 1818 sets forth no qualifications for membership except that the member be an elector. CONN. CONST. art. VI, § 4. The selectmen and the town clerk were given the power to "decide on the qualifications of electors... in such manner as may be prescribed by law". *Id.* at § 5.

stitution, unique in conception. The final article of the Pennsylvania Constitution of 1776 provided:

"Sect. 47. In order that the freedom of the commonwealth may be preserved inviolate forever, there shall be chosen by ballot by the freemen in each city and county respectively, [in 1783] and . . . in every seventh year thereafter, two persons in each city and county of this state, to be called the COUNCIL OF CENSORS; . . . whose duty it shall be to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are entitled to by the constitution . . ."

Pursuant to this mandate, the first Council of Censors met in 1783. Their report, which was adopted by a vote of 12-9 in 1784, PENN. CONST. PROC. 413-14, contained a section in which they discussed instances which the majority believed to represent abuses or violations of the constitution. One such instance, which generated a dissent by the minority, was the unanimous expulsion of a member by the general assembly in 1783 for frauds committed while a commissioner of purchases, an office which he held prior to becoming a member of the assembly. The majority's argument is summarized at the outset of the discussion:

"Section 9. 'The house of representatives shall have power to judge of the qualifications of their own members.'

"It is the opinion of this committee, that the general assembly has no right to expel one of its members, charged with crimes not committed as a member, but as a public officer or in his private capacity, *until* he shall be convicted thereof before his proper judges." *Id.* at 88-89 (emphasis added).

The issue which divided the Council was thus not whether the house had the power to adjudge a member unfit for reasons not specified in the constitution (although both *Walpole's Case* and the *Wilkes' Case* were discussed, *id.* at 89), but whether, in cases where the member was charged with committing a crime, it had the power to do so before a court had convicted him. The majority's principal concern was over the problem of prejudicing the jury in any criminal trial that might be had. *Ibid.*

When the constitution was revised in the 1790's, however, no change was adopted to prevent a repetition of the action found to be an abuse by the Council of Censors. The power to judge qualifications was retained unchanged; the power to expel was limited by requiring a two-thirds vote, as in the Federal Constitution. PENN. CONST. art. I, §§ XII, XIII (1790).

In the other case, the Virginia Assembly in 1780 excluded John Breckenridge on the ground that he was a minor, WARREN, *THE MAKING OF THE CONSTITUTION* 423 n.1 (1928) [hereinafter WARREN]. This was done even though there were no provisions in the Virginia Constitution requiring members of the state legislature to have attained their majority, nor expressly empowering the houses of the legislature to judge their members' qualifications.

D. SUMMARY.

Before turning to the Constitutional Convention of 1787, it seems useful to pause and to review briefly the state of the law at that time with respect to the power of a legislative body to judge the qualifications of its members.

As discussed above, the House of Commons had asserted and gradually established its exclusive jurisdiction to judge the qualifications of its members, and the Chancellor, the courts of law and the House of Lords had each ultimately disclaimed the power to inquire into the qualifica-

tions of members of the Commons. In practice, the Commons judged qualifications other than those described in statutes or the law and custom of Parliament and excluded or expelled members for reasons of character or conduct which it was believed rendered them unfit to assume that high office. The most widely known cases were those of Robert Walpole and John Wilkes, in which the Commons expelled them (although Wilkes had not been sworn or seated) and declared them incapable of sitting in the Commons during that Parliament. Moreover, it was pointed out several times in the course of the debates in the *Wilkes Case* that only the House of Commons had the power to judge the qualifications of its members, and the resolutions of both the Commons and the Lords affirmed this principle.

Blackstone, in his *Commentaries*, had provided a convenient synopsis of the law as to the power of the House of Commons to judge the qualifications of its members. He set forth what he termed "standing incapacities" enforced by statute or the law and custom of Parliament, each phrased in a negative form, and then went on to point out that for reasons beyond those "standing incapacities" a member could be held disqualified by the House of Commons for the duration of that Parliament. 1 BLACKSTONE, COMMENTARIES *163, *176.

Blackstone's *Commentaries* were widely read in the colonies, not by lawyers alone, but by educated laymen as well.* As one scholar has noted, in the late colonial period and after, "Blackstone was to American law what Noah Webster's blue-back speller was to be to American literacy." BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 202.

* Blackstone's *Commentaries* found such a reception by the colonists that, almost before the ink was dry on the pages of the first edition, they were being quoted on this shore. See BAILYN, PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 554, 559, 736 (1965) (first edition of *Commentaries*, published at Oxford in 1765, quoted by James Otis in pamphlet published in Boston in March of that year).

(1958), and as Edmund Burke pointed out to the House of Commons in 1775, in his speech *On Conciliation With America*,

"... The greater number of the deputies sent to the [continental] congress were lawyers. But all who read, and most do read, endeavour to obtain some smattering in that science. I have been told by an eminent bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the law exported to the plantations. The colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England. . . ." 1 WORKS OF EDMUND BURKE 222, 230 (1855).

Moreover, the first American edition of Blackstone's *Commentaries*, which was sold by subscription, sold 1500 copies,* and in the final volume the publisher, obviously encouraged by the popular response to his endeavors, advertised that he already was taking orders for a second edition (which, however, did not appear). Significantly, among the subscribers for the first American edition were nine men who subsequently were members of the Constitutional Convention of 1787.** 4 BLACKSTONE, COMMENTARIES (1st Amer. ed. 1772) (subscribers' list preceding title page). Unfortunately, no subscribers' list has been found for *Middlesex Election*, Blackstone's more detailed

* As might be expected, many of the subscribers were public officials or lawyers and a number of sets were sold to printers and booksellers, apparently for resale. But a very large number of subscribers were merchants, farmers or just "gentlemen", and sets were purchased by ministers, medical doctors, military officers, millers, a shoemaker, a "comedian", a cabinet-maker, a silversmith and a Professor of History and Languages, as well as representatives of other occupations. 4 BLACKSTONE, COMMENTARIES (1st Amer. ed. 1772) (subscribers' list preceding title page).

** Gunning Bedford, Jr., David Brearly, John Dickinson, William Livingston, Thomas Mifflin, Gouverneur Morris, Robert Morris, Roger Sherman and Robert Yates. *Ibid.*

exposition of the precedents for the House of Commons' action in the *Wilkes Case*, which was published by the publisher of the first American edition of the *Commentaries*, in Philadelphia in 1773. We are left, therefore, to conjecture as to the breadth of circulation and the influence of that work in this country.

On this side of the Atlantic, colonial legislatures began to judge the qualifications of their members as soon as they came into being, beginning with the first session of the first legislative body in the new world, the Virginia House of Burgesses, and continuing throughout their life as colonial legislatures. They found members disqualified on a number of grounds, many of which were not found in their organic charters or colonial acts. The Charters of Liberties of both Pennsylvania and New York specifically delegated to the respective colonial legislatures the power to judge the qualifications of their members, exclusive of any other jurisdiction. As John Randolph, speaker-elect of the Virginia House of Burgesses, admonished Governor Gooch, the House claimed the sole right to judge the qualifications of its members "lest contrary judgments, in the Courts of Law, might thwart or destroy Theirs." *JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA: 1727-1740*, at 242 (1910). When the colonists proclaimed their independence and promulgated in their new constitutions a framework for self-government, they almost invariably delegated to each house of the state legislature the power to judge the qualifications of its own members. However, in five of those constitutions, the power was limited in some manner which repudiated, in whole or in part, the parliamentary action in the *Wilkes Case* and the colonial precedents.*

Thus, as of 1787, the phrase "judge the qualifications", without express language of restriction, had become a term

* There was no similar provision in the Articles of Confederation. As has been noted, the delegates to the Continental Congress were in effect "ambassadors of twelve distinct nations". JENSEN, *THE ARTICLES OF CONFEDERATION* 56 (1963); ART. OF CONFED. art. V, cls. 1, 5.

of art with a well-defined and widely understood meaning. That meaning included a delegation exclusively to the legislative body of a broad discretion in excluding or expelling members who, by reason of personal character or conduct, had demonstrated themselves unfit to undertake the responsibilities of membership in a public body of such high order. It remains to be seen whether the framers at the Constitutional Convention of 1787 took any action or wrote into the Constitution any language which expressly, or by implication, indicated an intent either to depart from or to adhere to the well-established meaning of that phrase.

II. THE CONSTITUTIONAL CONVENTION OF 1787.

The Convention which was to draft the Constitution of the United States convened in Philadelphia on May 25, 1787. On May 29, Edmund Randolph of Virginia proposed the resolutions which history knows as the Virginia Plan. 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (rev. ed. 1966) [hereinafter FARRAND]. Randolph's resolutions with respect to the legislature provided that the members should be of a certain age (to be determined by the Convention) and ineligible to any other state or national office, *ibid.* There was no clause empowering the legislature or any other body to judge elections or qualifications or to expel a member.

On the next day, the Convention resolved itself into a committee of the whole house and commenced debate upon Randolph's resolutions. *Id.* at 29-30. The Convention continued to operate, almost without interruption, as a committee of the whole until July 16, 1787, during which time it considered not only Randolph's resolutions but also plans presented by other members.

On July 24, the Convention appointed a committee of detail, composed of John Rutledge, a lawyer and delegate from South Carolina; Edmund Randolph, a lawyer and delegate from Virginia; Nathaniel Gorham, a merchant and delegate from Massachusetts who had been a member of

the Massachusetts constitutional convention of 1779-80;* Oliver Ellsworth, a lawyer and delegate from Connecticut; and James Wilson, a lawyer who "was certainly one of the best-educated men in America" (1 *THE WORKS OF JAMES WILSON* ° (McCloskey ed. 1967)) and a delegate from Pennsylvania. 2 FARRAND 97. It was the mandate of the committee of detail to draft a constitution conforming to the resolutions which had been adopted by the Convention. *Id* at 85.

A. THE STANDING INCAPACITIES.

Before the committee of detail commenced its work, however, the Convention considered a resolution which had not been proposed by the committee of the whole. George Mason, of Virginia, moved on July 26, 1787, that the committee of detail provide a clause "requiring certain qualifications of landed property & citizenship" and disqualifying persons with unsettled accounts or who were indebted to the United States from being elected to the membership in the legislature. *Id.* at 121.

The proposed clause produced considerable debate. Gorham thought the matter ought to be left to the legislature. Madison thought the proposition a good one, but that it should be "new modelled". Gouverneur Morris was opposed to "such minutious regulations in a Constitution". *Id.* at 122. Dickinson of Delaware "was agst any recital of qualifications in the Constitution. It was impossible to make a compleat one and a partial one would by implication tie up the hands of the Legislature from supplying the omissions. . . ." *Id.* at 123. Madison then moved to strike out the word "landed" with respect to property, because of the difficulty of defining a uniform standard which would suit the different circumstances prevailing in the various

* Gorham had been quite active in the Massachusetts convention. He was a member (probably chairman) of the first committee appointed by that convention, MASS. JOURNAL 24, a member of the committee which prepared the first draft of the constitution, *id.* at 26, 28, and a member of a number of other drafting committees, *id.* at 31, 77, 79, 144.

states. *Id.* at 123-24. His motion was carried. Thereafter, the clauses relating to persons having unsettled accounts and to public debtors were stricken. *Id.* at 126.

The Convention adjourned on July 26, 1787, after referring its proceedings to the committee of detail. *Id.* at 128. It was in the committee of detail that the language of article I, section 2, clause 2 began to take shape. *See id.* at 178. Unfortunately, no minutes of the proceedings of the committee of detail are extant. However, Edmund Randolph apparently made an outline for discussion in committee of the provisions which the Constitution should contain, based upon the resolutions of the Convention. Each item in the document is either checked off or crossed out, indicating that it was used in the preparation of subsequent drafts. *Id.* at 137 n.6. The item dealing with qualifications of members of the House of Representatives reads as follows (matter in italics crossed out; matter in parentheses represents changes made by Randolph):

“5. The qualifications of (a) delegate(s) shall be the age of twenty five years at least, and citizenship: *and any person possessing these qualifications may be elected except*” *Id.* at 139.

Had the italicized language been adopted, it would have suggested an intention to repudiate the legal basis for the parliamentary and colonial decisions, including the *Wilkes Case*, heretofore discussed. However, when reported to the Convention by the committee of detail the clause had taken the following form:

“Sect. 2. Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of [in] the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen.” *Id.* at 178.

Thus, the committee of detail considered and rejected language which probably would have imposed a limitation

upon the power to judge qualifications, as that power had been interpreted in England, the colonies and the states.

The only changes which were made in the clause by the full Convention were the extension of the prerequisite citizenship to seven years and the change of the word "resident" to "inhabitant", *id.* at 216-19, and the clause remained in that form when it was submitted to the committee of style on September 10, *id.* at 565. However, when the committee of style reported out the clause on September 12, it had been recast in the negative form in which it now appears, *id.* at 590.

We have no records of the deliberations of the committee of style and thus are left to surmise as to why this change was made. According to Madison, it was the pen of Gouverneur Morris, a lawyer from Pennsylvania and member of the committee of style, *id.* at 553, which gave "[t]he *finish* . . . to the style and arrangement of the Constitution", 3 FARRAND 499. Morris, who therefore may be assumed to have been the person who changed the language, stated that he had "rejected redundant and equivocal terms" so as to make the Constitution "as clear as our language would permit". *Id.* at 420. It is, therefore, noteworthy that he recast that clause into the negative form which Blackstone used when listing the "standing incapacities", expressly pointing out that the House of Commons could adjudge a member incapable of sitting for other reasons. 1 BLACKSTONE, COMMENTARIES *163, *176 (4th ed. 1770) [and subsequent editions].* If it had been the intent of the Framers to limit the House's power to that of judging the "qualifications" set forth in article I, section 2, then the change made by the committee of style, particularly in light of the wide circulation of Blackstone's *Commentaries* in America, made the language more—not

* We know that Gouverneur Morris owned a copy of *Blackstone*. See 4 BLACKSTONE, COMMENTARIES (1st Amer. ed. 1772) (subscribers' list preceding title page).

less—equivocal. We believe it to be a fair inference that this change was effected to make clear that the Framers intended only to prescribe the standing incapacities without imposing any other limit on the historic power of each house to judge qualifications on a case by case basis.

The committee of detail had also reported out a provision which would enable the legislature to establish uniform qualifications for membership with regard to property. 2 FARRAND 179. It is largely upon the disposition of this provision by the convention that Professor Warren bases his conclusion that a single house can judge only those qualifications expressly set forth in the Constitution. WARREN 420. "For", states Warren, "certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress". *Id.* at 421. But an analysis of the action taken by the Convention on this clause, in light of the English and colonial background against which the Framers were writing, leads to the conclusion, we believe, that in voting down the clause the Convention was merely depriving Congress of the power to create new "standing incapacities" and that the Convention's action is not inconsistent with granting each house broad power to judge the character and conduct of its members.

On August 10, Charles Pinckney of South Carolina moved that the clause be changed to provide for the ownership of a specific quantum of property as a prerequisite for office. Rutledge, a member of the committee of detail, seconded the motion and explained that the committee had omitted any specific qualification because the committee could not agree among themselves. Pinckney's motion was rejected.* 2 FARRAND 248-49. The Convention then re-

* Presumably because, as earlier debates in the Convention revealed and the committee of detail concluded, the disparate economic conditions of mercantilist-commercial New England and plantation-agricultural southern tidewater precluded the construction of an acceptable uniform standard.

turned to consideration of the clause as reported out by the committee of detail, i.e., that Congress be empowered to establish prospective "uniform qualifications . . . with regard to property." It is at that point that Madison's often-quoted speech appears:

"Mr. [Madison] was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest. This was one of the former cases. It was as improper as to allow them to fix their own wages, or their own privileges. It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised by the stronger in order to keep out partizans of a weaker faction." *Id.* at 249-50 (footnotes omitted).

Thus, when read in the context in which it was made (Warren, it should be noted, takes this speech out of context and places it after Morris' motion, discussed below, WARREN 420), it seems clear that Madison was directing his argument against the proposition that Congress should have the unlimited power to establish "standing incapacities" in an area which had traditionally been the subject of such legislation in both England and the colonies. See 1

BLACKSTONE, COMMENTARIES *176; WARREN 416-17. When it is recalled that the motion under discussion was to allow Congress to establish uniform property qualifications—a motion which was ultimately defeated—it seems clear that, in speaking of the threat of converting a republic into “an aristocracy or oligarchy”, Madison’s reference was to the property requirements which had been imposed as restrictions upon membership in Parliament. For, as Blackstone candidly notes, those requirements, unlike the power to judge qualifications, had been used to keep “an aristocracy or oligarchy” in power.*

After, not before (*cf.* WARREN 420), Madison’s speech, a motion was made by Gouverneur Morris to strike out “with regard to property” in the proposed clause giving Congress the power to establish “uniform qualifications”. 2 FARRAND 250. It was in response to this motion, which was subsequently defeated, that Madison gave his observations on the British Parliament:

“Mr. [Madison] observed that the British Parliament possessed the power of *regulating* the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties.” *Ibid.* (emphasis added).

Once again, Madison’s remarks were addressed to a clause which, if enacted, would have given to Congress the power to establish, without limitation, any new “standing incapacity” which the majority of the moment thought desirable. It would also seem from his speech that it was

* “That every knight of a shire shall have a clear estate of freehold or copyhold to the value of six hundred pounds per annum, and every citizen and burgess to the value of three hundred pounds; except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities: *which somewhat balances the ascendancy which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men . . .*”, 1 BLACKSTONE, COMMENTARIES *176 (emphasis added).

Parliament's abuse of this power, not its use of the power to judge individual qualifications, that he was referring to. High on the list of those abuses in Madison's mind must have been the Parliamentary Test Act (30 Car. II st. 2, c. 1 (1678)) which had excluded Catholics as a group from Parliament.* It seems more probable that this Act, rather than, as Warren suggests, the *Wilkes Case*, was the "lesson" to which Madison referred. Cf. WARREN 420. Since the power to "establish" standing restrictions on membership and the power to "judge" qualifications had traditionally been treated as two separate and distinct powers, and since the House of Commons in expelling Wilkes had acted under its power to "judge", stripping the Congress of the power to "establish" standing restrictions would impose no limitation upon the power of either house to deal with any future "*Wilkes Case*"; only a limitation on the power of each house to judge qualifications or to expel a member** could have that effect. All of these factors taken together suggest that Professor Warren's connection of Madison's speech and the *Wilkes Case* lacks substantial justification.

It was also in this context that Williamson made his observation that

"Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body."
2 FARRAND 250.

The language of Williamson's speech likewise indicates that he was concerned about the possibilities of abuse if Congress were given an unlimited power to establish new

* That such statute was in the minds of the Framers is indicated by the prohibition contained in article VI, section 3, which was not contained in the draft reported out by the committee on detail, 2 FARRAND 188, but was introduced by Pinkney on August 20, *id.* at 342, ten days after Madison's speech.

** Thus, the two-thirds requirement for expulsion, proposed by Madison, may reflect concern over the *Wilkes Case*, see pp. 57-58 *infra*.

"standing incapacities," rather than if a house had the right to consider the qualifications of its members on an individual basis.

B. THE POWER TO JUDGE QUALIFICATIONS.

The provision giving to each house the power to judge the qualifications of its members was not contained in the resolutions of the Convention which were referred to the committee of detail. *Id.* at 129-33. It first appeared in a draft prepared by James Wilson, which apparently was used in the course of deliberations by the committee of detail. *Id.* at 155. It is well to recall here that Gorham, a member of the committee, had been quite active in the Massachusetts constitutional convention, and that the Massachusetts convention had adopted a provision which limited the power of the legislature to judging those qualifications "pointed out in the constitution". Moreover, we have the testimony of another member of the committee, Edmund Randolph, that "the Constitution of Massachusetts was produced . . . in the grand Convention." 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 368 (1876). But the limitation contained in the Massachusetts Constitution was not adopted even though knowledge of its existence and of the presumed necessity for it, at least in the eyes of Massachusetts, in the *Wilkes Case* and the colonial practice was to be repudiated, must be imputed to at least two members of the committee. Nevertheless, the "judge qualifications" clause was reported out of the committee of detail in the form in which it now appears in the Constitution, 2 FARRAND 180, and was adopted by the Convention "nem. con.", *id.* at 254.

C. THE POWER TO EXPEL.

The resolutions referred by the Convention to the committee of detail also lacked a provision giving to the houses of Congress the power to expel members. That provision

was first referred to in the outline for discussion prepared by Edmund Randolph:

"13. (quaere. how far the right of expulsion may be proper.) The house of delegates shall have power over its own members." *Id.* at 140.

Such a provision was first set forth in the draft prepared by Wilson, referred to above, in the following language:

"Each House may expel a Member, but not a second Time for the same Offense." *Id.* at 156.

It should here be kept in mind that James Wilson was from Pennsylvania and that the Pennsylvania Constitution contained a clause which prohibited the expulsion of a member of the state legislature a second time for the same offense. In the next draft prepared by Wilson,* the provision appeared in the following form (parentheses indicate matter crossed out; italics indicate matter added):

"Each House (shall have Authority to) *may* determine the Rules of its Proceedings, (and to) *may* punish its (own) Members for disorderly Behaviour. (Each House) *and may* expel a Member, (but not a second Time for the same Offense)." *Id.* at 166.

The effect of the omissions and additions indicated in that draft is to cast the clause into the form in which it was reported out by the committee of detail (except for capitalization and punctuation), *id.* at 180. Thus, it appears that the committee of detail considered and rejected yet another provision which would have limited the power of each house of Congress in a manner which would have repudiated in part the decision in the *Wilkes Case* and in

* This draft contains emendations in Rutledge's hand; so we know that it was considered by at least one other member of the committee.
2 FARRAND 163 n.17.

the colonial cases.* The only change made in the clause by the Convention was the insertion, on Madison's motion, of the phrase "with the concurrence of $\frac{2}{3}$ " between the words "may" and "expel". *Id.* at 254. As so amended, the clause was agreed to "nem.con.". *Ibid.*

Although, as we have pointed out above, there seems to be no reason for concluding that Madison had the *Wilkes Case* in mind when speaking in opposition to the proposal to allow Congress to create new standing incapacities, as Warren suggested, it is entirely possible that he was thinking of that and similar cases here. This becomes clear when it is recalled that Wilkes was initially expelled from the Commons and that Pennsylvania, Delaware and Maryland had limited the expulsion power, apparently as a reaction to the *Wilkes Case*.

D. SUMMARY.

Thus the Convention considered and rejected at least two clauses, and possibly a third (the Massachusetts variant), which would have repudiated, in whole or in part, the English and colonial precedents, including the *Wilkes Case*. On the other hand, the acts of the Convention in rejecting provisions which would have given to Congress the power to create new "standing incapacities" do not, in our analysis, really bear on the question whether each house was denied power to judge qualifications of individual members.

III. THE RATIFICATION PERIOD.

There remains for consideration whether any further light was cast on the Framers' understanding of the mean-

* Neither "Wilkes" nor "*Wilkes Case*" appears in the index to Farrand (4 FARRAND 127, 226), although other names mentioned in the debates do, e.g., "Blackstone", "Bolingbroke", and "Bowdoin" (*id.* at 134-35). Presumably, therefore, to the extent that our present records are complete, Wilkes was not discussed in the Convention.

ing of the "judge qualifications" clause during the period of the ratification conventions (1787-1789).

Our review of the convention proceedings in the several states, as set forth in *Elliott's Debates*, has not revealed any discussion of article I, section 3, or of the scope of the power to judge qualifications or to expel conferred thereby. Moreover, our research has not disclosed any discussion of the precise point by any of the leading public commentators of the period.

There was, however, considerable public concern when the Constitution was proposed that the upper-class members of the Convention had been able subtly to manipulate the mechanics of representation so as to exclude from a voice in Congress those who were not members of their own class. That concern was evidenced by a debate which occupies some of the most frequently-cited pages of *The Federalist*.

One of the most sophisticated and articulate spokesmen for the anti-Federalist faction in New York was "Brutus," thought to be the political pseudonym for Robert Yates.* He speculated that by deft execution of the power given to Congress in article I, section 4 to regulate the times, places and manner of electing Members of Congress, the "rich and well-born" might be preferred:

"It is clear that, under this article, the federal legislature may institute such rules respecting elections as to lead to the choice of one description of men. The weakness of the representation, tends but too certainly to confer on the rich and *well-born*, all honours; but the power granted in this article, may be so exercised, as to secure it almost beyond a possibility of controul." *Brutus No. IV*, N. Y. Independent Journal, Nov. 29, 1787.

It was to meet this argument that Hamilton wrote *The Federalist* No. 60. Article I, section 4 is the only clause of

* KENYON, *THE ANTIFEDERALISTS* 323 (1966).

the Constitution he discussed in that number, except in an aside where he referred to the lack of a congressional power to prescribe qualifications with respect to property:

"The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect, or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections: The qualifications of the persons who may choose or be chosen, as has been remarked upon another occasion, are defined and fixed in the constitution; and are unalterable by the legislature." THE FEDERALIST No. 60, at 408-09 (Cooke ed. 1961) [all subsequent references are to this edition unless otherwise indicated].

Hamilton's statement standing alone could be interpreted as expressing the belief that a house of Congress may consider only those qualifications specified in the Constitution. But when his statement is read in context, it is seen that he was directing his comments to another issue, i.e., the proper interpretation of the "Times, Places and Manner" clause, while reiterating that Congress could not prospectively impose qualifications, applicable to all seeking election, in addition to those specified in the Constitution.*

Madison's statement in *The Federalist* No. 52, which probably was the "other occasion" referred to by Hamilton,

*It is sometimes forgotten that *The Federalist* is "a piece of very special pleading" which "worked only a small influence upon the course of events during the struggle over ratification. Promises, threats, bargains, and face-to-face debates, not eloquent words in even the most widely circulated newspapers, won hard-earned victories for the Constitution in the crucial states of Massachusetts, Virginia, and New York." THE FEDERALIST xi, xv (Rossiter ed. 1961) (introduction).

seems similarly directed to the lack of power to create new "standing incapacities":

"The qualifications of the elected being less carefully and properly defined by the State Constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States, must at the time of his election, be an inhabitant of the State he is to represent, and during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the Federal Government, is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Id.* at 354-55.*

Madison seems here to be arguing against the existence of any power in Congress to create, by legislation, new prerequisites with respect to matters of religion, property, birth or profession, matters which had traditionally been the subject of legislatively created "standing incapacities", by Parliament, 1 BLACKSTONE, COMMENTARIES *163, *175-76, by colonial legislatures, CLARKE 151-52, and by the states, WARREN 416-17. He was meeting the charge that "the House of Representatives . . . will be taken from that class of citizens which will have least sympathy with the mass

* In *The Federalist* No. 57, Madison reiterated his conclusions in No. 52:

"Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. *No qualification of wealth, of birth, of religious faith, or of civil profession,* is permitted to fetter the judgment or disappoint the inclination of the people." *Id.* at 385. (emphasis added).

of the people", THE FEDERALIST No. 57, at 384, by correctly pointing out that, in so far as the standing prerequisites for office were concerned, the House of Representatives was more democratic than most state legislatures. So far as appears from the text, he did not purport to discuss in any detail the power of the houses of Congress to judge the qualifications of their respective members. His statement that "the door . . . is open to *merit* of every description" (emphasis added) may well indicate that he held the view that each house possessed the power to inquire into the individual fitness or capacity of its members and to exclude or expel an individual for unfitness *i.e.*, the very power which the English, colonial and state legislatures had exercised and which both houses of Congress subsequently exercised.

In light of the long history of colonial and state practice underlying the power to judge qualifications, interpreted to encompass the power to inquire into the individual character and conduct of the member, we cannot subscribe to petitioners' suggestion that the Constitution would not have been ratified if such had been the intent of the Framers. Br. 46-47. We have found no discussion of the issue either in the state ratification conventions or in the principal pamphleteers and commentators* of the period. The general statements in the conventions of New York, Pennsylvania and Virginia to which petitioners refer were directed to other issues. Significantly, the constitutions and practices of those states placed no restriction on the power of legislative bodies to adjudge an individual as unqualified because of his personal misconduct and to exclude or expel him (although in Pennsylvania, he could not be expelled a second time for the same offense). See pp. 28-32, 36-37, 41-44, *supra*; Appendix B. The power was not discussed, we believe, simply because the "wide-spread acceptance of the belief that such power belonged to the legislature was as great in the colonies as it was in England", CLARK 198, and the power was therefore not controversial.

IV. CONCLUSION

When the Framers wrote into article I, section 5 of the Constitution the power of each house of Congress to judge the qualifications of its members and granted the power to expel a member upon a two-thirds vote, they were not writing upon a blank slate. They were writing against a background of some 160 years of colonial and state experience, coupled with several centuries of parliamentary practice, during which time the words used by the Framers had attained a precise, well-defined and widely accepted meaning. The language chosen, absent express limitation, encompassed an exclusive, unreviewable power on the part of the legislative body to judge the individual fitness or capacity of the member, unrestricted by the standing prerequisites for office.

At the Constitutional Convention, the Framers took no action and wrote into the Constitution no language (with the exception of the two-thirds vote limitation on the power to expel) which evinced an intent to repudiate the experience with which they were familiar. The debates relied upon by Warren and others were directed to quite a different issue: whether Congress should have the power to create new standing incapacities. Moreover, the Convention deliberately rejected several proposals which would quite clearly have imposed restrictions upon the power as traditionally interpreted.

Finally, given the wide acceptance on this side of the Atlantic of the power to judge a member's individual fitness, the absence of any discussion of the power during the ratification campaign and the absence of any evidence or basis for conjecturing that the *Wilkes Case* was in the forefront of the public mind nearly twenty years after it occurred, we see no basis for speculating that the Constitution would not have been ratified if the power to judge qualifications had been so understood.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, JR., *et al.*,

Petitioners,

—against—

JOHN W. MCCORMACK, *et al.*,

Respondents.

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND
NEW YORK CIVIL LIBERTIES UNION *AMICI CURIAE***

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Interest of *Amici*

The American Civil Liberties Union and its New York affiliate, the New York Civil Liberties Union, are committed to the protection of constitutional rights and individual liberty. In furtherance of these goals, *amici* have traditionally defended the rights of citizens of every persuasion in the courts, the legislatures, and the executive departments of government.

No right is more fundamental to citizenship and democracy than the right to representation in legislative bodies in accordance with the mandate of the voters. When so basic a right is challenged, grave concern is occasioned for our most precious institutions, as well as our rights.

The rights of the people of the 18th Congressional District of New York to be represented by Adam Clayton Powell, Jr., and his right to his seat is therefore an issue of pressing public concern. Here the right of the man is indivisible from the right of the people, and ultimately of the national electorate. If the choices of the voters duly expressed through orderly democratic procedures are allowed to be thwarted, those processes will soon no longer be looked to for the vindication of grievances. *Amici* believe therefore that a decision for respondents would have effects beyond the repudiation of the rights of the individual parties herein involved and would constitute a threat to democratic government itself. This brief is therefore submitted in support of petitioners and in the public interest.*

Questions Presented

1. Whether the House of Representatives violated the Constitution of the United States when it refused to seat in the 90th Congress a duly elected Representative who met all the constitutional qualifications for membership in the House.

2. Whether the constitutional validity of the exclusion of a duly elected Representative who met all the constitutional qualifications for membership in the House is a justiciable question appropriate for determination in the federal courts.

* Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

Statement of the Case

This case has its origins in the decision of the 90th Congress to exclude petitioner Adam Clayton Powell, Jr. from the House of Representatives. At the general election of November 8, 1966, petitioner was duly elected to the office of Representative from among four candidates by the voters of the 18th Congressional District of the State of New York. A Congressional Committee of nine members was appointed to investigate petitioner's "right . . . to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative . . ." Finding No. 1 of the Committee's report confirmed that petitioner was "over 25 years of age, has been a citizen of the United States of America for over seven years, and on November 8, 1966, was an inhabitant of the State of New York." The Committee found that petitioner had improperly asserted his privilege and immunity from the processes of the courts of the State of New York and that in several instances he had misappropriated public funds. It recommended that he be seated but be censured, fined, and stripped of seniority. Nevertheless, on March 1, 1967, the House refused to seat petitioner.

On March 8, 1967, petitioner and thirteen of his constituents, representing the class of the electors of the 18th Congressional District, filed suit in the District Court for the District of Columbia seeking declaratory and injunctive relief and relief in the nature of mandamus. On April 7, 1967 the District Court denied the application for a statutory three-judge court and preliminary injunction and dismissed the complaint for lack of jurisdiction over

the subject matter, grounding its decision on the doctrine of separation of powers. After delay on appeal while petitioner unsuccessfully sought certiorari from this Court in advance of decision in the Court of Appeals for the District of Columbia, that court on February 28, 1968 affirmed the dismissal of the complaint. This Court granted certiorari on November 18, 1968. Petitioner has been seated in the 91st Congress.

A R G U M E N T

I.

The House of Representatives Violated the Constitution of the United States When It Refused to Seat in the 90th Congress a Duly Elected Representative Who Met All the Constitutional Qualifications for Membership in the House.

The Constitution, Article I, section 2, clause 2, imposes three qualifications for membership in the House of Representatives:

No person shall be a Representative who shall not have attained to the Age of twenty-five years, and been seven years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Article I, section 5, states that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members" This case presents the question whether the combined effect of these two provisions empowers a simple majority of the House of Representa-

tives to refuse to seat a Representative duly elected by his constituency. The most convincing view is that such a reading of the Constitution is wholly refuted by the history of the framing and ratification of the Constitution, by judicial commentary on that history, by the theory of government which underlies both the Constitution and our system of government, and by those precedents of the House of Representatives which draw upon that theory of government.

It is unnecessary to repeat here the exhaustive documentation of these points which appears in petitioner's brief. But the underlying theory should be reemphasized: that Article I, section 2, clause 2 and Article I, section 5 are to be strictly construed so that the limited function of Congress to judge the enumerated qualifications of Representatives be distinctly separated from the unfettered right of the people to elect their own Representatives.

We do not mean to imply that serious questions are not left open by the words and the history of the Constitution: for example, whether Article I, section 5, precludes judicial review of the findings of fact Congress may make in judging whether an elected Representative meets the three qualifications of section 2, clause 2; whether Article I, section 5, precludes judicial review of the issue of due process of law; and whether Congress could legitimately exclude an elected Representative who still held office under the United States, taking Article I, section 6, clause 2, as setting an additional qualification for members of Congress. But none of these more difficult questions is presented by this case. The House Select Committee explicitly found that Mr. Powell satisfied the requirements of age, citizenship, and inhabitancy; and it did not pre-

tend to find that Mr. Powell failed to meet any other stated qualification set by the Constitution.

The skepticism of the framers concerning the use of power by the majority to infringe the rights of minorities is as well known and as widely recognized as any fact about the American political experience. Such fears explain the requirements of a two-thirds vote for the power of expulsion from Congress—a power thought necessary to be given Congress, even though it is otherwise unrestricted by the words of Article I, section 5, clause 2. Since the framers unquestionably realized that the expulsion power might be invoked in a case of this sort and thus sought to control the abuse of that power by increasing the voting majority required, it cannot be thought that they contemplated direct evasion of that limitation through the exclusion power. It would be a strange constitution which prevented a simple majority of Representatives from expelling a fellow member for alleged misconduct, but allowed them to exclude him when, within two years, he was reelected by his constituents and sought to be seated in the new Congress.

While the best precedents of the House of Representatives support the position taken here, the worst of those precedents illustrate the precise dangers which the Constitution must be read to prevent. The cases of Brigham H. Roberts, the Mormon, and Victor L. Berger, the Socialist,¹ show that the framers' reluctance to trust a majority of either House to safeguard the right of the people to be represented by their duly elected representatives was fully justified.

¹ The details of these cases are reported in the Brief for Petition, p. 96, n. 62.

It was because they attached cardinal importance to representative government that the framers circumscribed the power of Congress to judge qualifications with specifically enumerated standards.² Thus the instability of representative government that could have resulted from a broader delegation of power was avoided by the inclusion of a section that provides a plain standard for Congressional judgment.³

The breadth of Congressional power claimed in this case would literally undo the clear intent of Article 1, Section 2, clause 2 to leave only minimum discretion to the House. Such discretion is constitutionally denied because its exercise is fraught with possibilities for bias. On the occasion of the challenge to Senator Reed Smoot, Senator Knox reminded his colleagues of the way in which the enumerated qualifications facilitate objectivity of judgment in the seating of Congressmen:

"The simple constitutional regulations of qualification do not in any way involve the moral qualifications of

² No less an authority than Mr. Justice Story regarded the enumeration as dispositive: "It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision, the affirmance of these qualifications would seem to imply a negation of all others." *Story on the Constitution*, ¶625. See also Cooley, *Constitutional Limitations* 78; Cushing, *Law and Practice of Legislative Assemblies* 27 (2nd ed.); Foster, *Treatise on the Constitution* 367; McCrary, *Law of Elections*, ¶312; Paschal, *Annotated Constitution* 305 (2nd ed.); Tucker, *Treatise on the Constitution* 394.

³ For cases directly involving the enumerated qualifications, see *John Young Brown*, 1 Hinds ¶418 (excluded for age); *John Bailey*, 1 Hinds ¶434 (excluded for non-inhabitancy); *Jennings Piggott*, 1 Hinds ¶369 (excluded for non-inhabitancy).

the man; they relate to facts outside the realm of ethical considerations and are regulations of fact easily established. Properly enough, therefore, as no sectional, partisan, or religious feeling could attach itself to an issue as to whether or not a man is thirty years of age, had been a citizen of the United States and an inhabitant of a State for the periods prescribed, the decision as to their existence rests with the majority of the Senate."⁴

The inevitable danger of bias inherent in broader Congressional power was of specific concern to the authors of the Constitution. Madison regarded a Congressional power to establish qualifications as "an improper and dangerous power in the Legislature."⁵ In the authoritative work, *The Making of Our Constitution* (1928), Professor Charles Warren further reports of Madison the view that:

"If the Legislature could regulate them [qualifications], 'it can by degrees subvert the Constitution . . . by limiting the number capable of being elected Qualifications founded on artificial distinctions may be devised by the stronger, in order to keep out partisans of a weaker faction.' He also pointed out 'the British Parliament possessed the power of regulating the qualifications . . . of the elected and the abuse they had made of it was a lesson worthy of our attention.' They had made changes in qualifications 'subservient to their own views or to the views of political or religious parties.' The Convention evidently concurred

⁴ 58th Cong. 1903, 1 Hinds, ¶¶481-484.

⁵ Quoted in Warren, *The Making of Our Constitution* 420 (1928).

in these views; for it defeated the proposal to give to Congress power to establish qualifications in general, by a vote of seven States to four" (p. 420)

In the *Federalist Papers* (No. 68) Hamilton agreed that the requirements for Congressional office "are defined and fixed in the Constitution; and are unalterable by the Legislature."

It cannot be doubted that broader discretion than that expressly given would give Congress a power incompatible with democratic elections and representative government. With broader discretion to judge the qualifications of its members, Congress and not the people would exercise the ultimate electoral power—a power that would reveal itself when controversial figures sought admission to the House.*

To its credit, Congress has with few exceptions—arising in times of special stress—been faithful to the constitutional mandate and the intent of the constitutional fathers. In modern cases, Congressional adherence to constitutional principle has been striking. Senator William Langer was seated in 1942 despite a challenge involving "charges [that] were numerous . . . chiefly involv[ing] moral turpitude," including kickbacks, conversion and bribery.⁷ Rep. Francis Shoemaker was seated by the House in 1933, though convicted of a crime and sentenced.

* See generally Brief filed by Special Committee of the Association of the Bar of the City of New York (Hon. Charles Evans Hughes, chairman) supporting the right of five elected Socialists to seats in the New York State Assembly. *In the Matter of Louis Waldman, August Claessens, Samuel A. DeWitt, Samuel Orr and Charles Solomon* (January 21, 1920).

⁷ See *Senate Election, Expulsion & Censure Cases* 141.

The modern Congressional practice of strict adherence to the constitutional qualifications adopts the interpretation developed in the very first cases. In the first fully debated House case, *William McCreery*, 10th Cong., 1807, 1 Hinds ¶414, the House voted in favor of seating McCreery on the principle, as put by Rep. Findley, Chairman of the Committee on Elections, that Congress is "not authorized to *prescribe* the qualifications of their own members, but they are authorized to *judge* of their qualifications; in doing so, however, they must be governed by the rules prescribed by the Federal Constitution." See also the case of *Humphrey Marshall*, S. Jour., 4th Cong. 1st Sess., pp. 194, et seq. (Senate refused to consider charges of "gross fraud", and perjury because not among qualifications for which Congress could exclude); compare *Bond v. Floyd*, 385 U. S. 116 (1966).

Despite its laudable record, Congress has in rare instances of extreme political tension wavered from its adherence to constitutional principle and precedent.⁸ The chief categories of these cases reflected anti-Mormon,⁹

⁸ Indeed it would be unusual if so political a body as the Congress were to have had a perfect record in such cases throughout our history. As Chafee notes:

"The precedents rarely afford a satisfactory formulation of the principle on which the House acted, which can be automatically applied in subsequent cases after the manner of court decisions. A legislature is not by nature a judicial body. Its members are chosen and organized for carrying out policies, and not, like judges, for the sole purpose of thinking together . . . Moreover, the basis of legislative discussion is often obscure because of the number of persons who join in debates." Chafee, *Freedom of Speech*, 343-344 (1920).

The non-judicial nature of Congressional precedent renders even more necessary strong adherence to constitutional language.

⁹ Case of *Brigham Roberts*, 56th Cong., 1899, 1 Hinds ¶474. But see case of *Reed Smoot*, 58th Cong., 1903, 1 Hinds 481-484 (Mormon subsequently seated by Senate).

anti-Confederate,¹⁰ and anti-Socialist¹¹ feeling. We urge the repudiation of what little life may be left in precedents which principally reflect the prejudices of prior eras.

The debates on petitioner's eligibility leave no doubt that his conduct coupled with assorted political pressures were the bases for his exclusion from the House. But the prescriptions in Article I, section 2, clause 2, were designed to free the question of eligibility from such subjective criteria and from political moods and tensions. If Congress should now be allowed to venture beyond the constitutionally enumerated qualifications, a long discredited view of the Constitution—rooted in periods of furor not fairness—would be resurrected. This Court alone has the authority and the duty to correct the abuse of constitutional principle presented here.

¹⁰ Cases of *Kentucky Members*, 40th Cong., 1867. But see Sec. 3 of the 14th Amendment, enacted subsequently, which expressly disqualified former active Confederates from serving in Congress.

¹¹ Case of *Victor Berger*, 66th Cong., 58th Cong., Rec. (1919). But see *Bond v. Floyd*, 385 U. S. 116 (1966).

II.

The Subject Matter of This Suit Is Justiciable, and the Opinions of the Lower Courts to the Contrary Dangerously Undermine the Historic Constitutional Role of the Federal Judiciary as the Guardian of the Civil and Political Liberties of the People.

Given that the House of Representatives exceeded its granted power under the Constitution, Article I, section 5, in excluding Mr. Powell from the 90th Congress, the crucial question is whether this case involves a "political question," and is therefore "non-justiciable." This Court has frequently rejected any simple test for determining this issue: it involves "a delicate exercise in constitutional interpretation." *Baker v. Carr*, 369 U. S. 186, 211 (1962). In *Baker* this Court listed six considerations which might lead to a decision of non-justiciability:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U. S. at 217.

It should be clear that the first, second, third, and fifth considerations have no application to this case; (1) As to the first, the issue before the Court is *whether the power to exclude Mr. Powell on grounds not specified in the Constitution was committed to the House of Representatives*. It cannot be argued that there is a "textually demonstrable commitment" of that issue to a "coordinate political department." This Court could conceivably decide, notwithstanding petitioners' arguments that Congress has the power to set the qualifications of its members; this decision—and its converse—could not be said to violate this aspect of the political question doctrine. (2) Respecting the second consideration, the constitutionality of Mr. Powell's exclusion is a matter of constitutional interpretation involving the application of traditional standards. (3) Non-judicial discretion reflecting policy is in no way involved, rendering irrelevant the third consideration. (4) As to the fifth consideration, it is not a *political* decision on the part of Congress that is being attacked, but a Congressional decision as to the extent of its own constitutionally granted powers.

What remain are the fourth and sixth considerations. In this particular case, we are unable to read into the latter—embarrassment from multifarious pronouncements—any considerations that do not apply even more strongly to the former—the impossibility of a court undertaking independent resolution without expressing lack of the respect due coordinate branches of government. We therefore will focus upon the "due respect" issue.

Would a decision by this Court that the House of Representatives acted unconstitutionally and the remedies necessary to enforce that judgment show such "lack of respect"

to the House and to Congress that this Court should refuse to decide this case? There are compelling arguments why the answer to this question should be "No." First, the intention of the framers of the Constitution regarding the meaning of the constitutional provisions in question is clear: a House of Congress is *not* free to set the qualifications of its members for the purposes of exclusion. As this Court early made clear, such limitations on Congress were not drafted in order to be ignored:

... The powers of the legislature are defined and limited; and that these limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? ...

... [P]rescribing limits, and declaring that those limits may be passed at pleasure ... reduces to nothing what we have deemed the greatest improvement on practical institutions, a written constitution. *Marbury v. Madison*, 1 Cranch 137, 175, 178 (1803).

Second, this case concerns a right which this Court has emphasized again and again as the bedrock of a constitutional republic: the right of a constituency to vote for its representative and have that vote be *effective*.

[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, [and] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds v. Sims*, 377 U. S. 533, 562 (1964).

A greater infringement on the right to vote than the right of a majority of the House to exclude the elected representative can scarcely be imagined. An important justification for judicial intervention in the reapportionment cases was that malapportioned legislatures could not be relied upon to cure themselves—i.e., that a system which relies upon legislatures to cure fundamental legislative abuses involving the rights of the people to be represented in those legislatures, does not adequately protect those rights at all. The same is true in this case.

Third, the remedies appropriate to this case do not involve such extensive intervention or examination into the internal workings of the House of Representatives as to justify the conclusion that the lack of respect shown will outweigh the importance of the rights involved. A writ of mandamus to the Speaker and other officers of the House, requiring that Mr. Powell be seated in the 90th Congress, is no longer necessary, since that Congress is concluded and Mr. Powell is now seated in the 91st Congress. Conventional remedies of declaratory judgment and relief directed against the agents and employees of the House raise no issue of "due respect." See *Kilbourne v. Thompson*, 103 U. S. 168 (1880).

But though a writ of mandamus to seat Mr. Powell is no longer required in this case, we fully agree that such a remedy is appropriate, and in fact required, in cases where a majority of a House of Congress have unconstitutionally refused to seat a qualified representative elected to that House. It is a strange "respect" which is based not upon an acknowledgment of special expertise or superior knowledge and competence, but upon fear that the legislative

branch will not "respect" the neutral determination of a constitutional issue by the appropriate branch of government. The traditional duty of this Court to act as an independent check upon legislative and executive actions, insuring that they conform to the supreme law of the land, obtains here no less than in other cases. Where, as here, there is a clear violation of a fundamental Constitutional right,* this Court's duty is clear.

CONCLUSION

The judgment below should be reversed and appropriate relief granted.

Respectfully submitted,

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March 1969

SUPREME COURT OF THE UNITED STATES

No. 138.—OCTOBER TERM, 1968.

Adam Clayton Powell, Jr., et al., Petitioners, v. John W. McCormack et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Dis- trict of Columbia Circuit.
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[June 16, 1969.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

In November 1966, Petitioner Adam Clayton Powell, Jr., was duly elected from the 18th Congressional District of New York to serve in the United States House of Representatives for the 90th Congress. However, pursuant to a House resolution, he was not permitted to take his seat. Powell (and some of the voters of his district) then filed suit in Federal District Court, claiming that the House could exclude him only if it found he failed to meet the standing requirements of age, citizenship, and residence contained in Art. I, § 2, of the Constitution—requirements the House specifically found Powell met—and thus had excluded him unconstitutionally. The District Court dismissed petitioners' complaint "for want of jurisdiction of the subject matter." The Court of Appeals affirmed the dismissal, although on somewhat different grounds, each judge filing a separate opinion. We have determined that it was error to dismiss the complaint and that Petitioner Powell is entitled to a declaratory judgment that he was unlawfully excluded from the 90th Congress.

I.

FACTS.

During the 89th Congress, a Special Subcommittee on Contracts of the Committee on House Administration

conducted an investigation into the expenditures of the Committee on Education and Labor, of which Petitioner Adam Clayton Powell, Jr., was chairman. The Special Subcommittee issued a report concluding that Powell and certain staff employees had deceived the House authorities as to travel expenses. The report also indicated there was strong evidence that certain illegal salary payments had been made to Powell's wife at his direction. See H. R. Rep. No. 2349, 89th Cong., 2d Sess., 6-7 (1966). No formal action was taken during the 89th Congress. However, prior to the organization of the 90th Congress, the Democrat members-elect met in caucus and voted to remove Powell as chairman of the Committee on Education and Labor. See H. R. Rep. No. 27, 90th Cong., 1st Sess., 1-2 (1967).

When the 90th Congress met to organize in January 1967, Powell was asked to step aside while the oath was administered to the other members-elect. Following the administration of the oath to the remaining members, the House discussed the procedure to be followed in determining whether Powell was eligible to take his seat. After some debate, by a vote of 364 to 64 the House adopted House Resolution 1, which provided that the Speaker appoint a Select Committee to determine Powell's eligibility. 113 Cong. Rec. 16 (daily ed. Jan. 10, 1967). Although the resolution prohibited Powell from taking his seat until the House acted on the Select Committee's report, it did provide that he should receive all the pay and allowances due a member during the period.

The Select Committee, composed of nine lawyer-members, issued an invitation to Powell to testify before the Committee. The invitation letter stated that the scope of the testimony and investigation would include Powell's qualifications as to age, citizenship, and residency; his involvement in a civil suit (in which he had been held in contempt); and "[m]atters of . . . alleged official

misconduct since January 3, 1961." See Hearings on H. R. Res. No. 1 before Select Committee Pursuant to H. R. Res. No. 1, 90th Cong., 1st Sess., 5 (1967) (hereinafter Hearings). Powell appeared at the Committee hearing held on February 8, 1967. After the Committee denied in part Powell's request that certain adversary-type procedures be followed,¹ Powell testified. He would, however, give information relating only to his age, citizenship, and residency; upon the advice of counsel, he refused to answer other questions.

On February 10, 1967, the Select Committee issued another invitation to Powell. In the letter, the Select Committee informed Powell that its responsibility under the House Resolution extended to determining not only whether he met the standing qualifications of Art. I, § 2, but also to "inquire into the question of whether you should be punished or expelled pursuant to the powers granted . . . the House under article I, section 5, . . . of the Constitution. In other words, the Select Committee is of the opinion that at the conclusion of the present inquiry, it has authority to report back to the House recommendations with respect to . . . seating, expulsion or other punishment." See Hearings 110. Powell did

¹ Powell requested that he be given (1) notice of the charges pending against him, including a bill of particulars as to any accuser; (2) the opportunity to confront any accuser, to attend all committee sessions where evidence was given, and the right to cross-examine all witnesses; (3) public hearings; (4) the right to have the Select Committee issue its process to summon witnesses for his defense; (5) and a transcript of every hearing. Hearings on H. R. Res. No. 1 before Select Committee Pursuant to H. R. Res. No. 1, 90th Cong., 1st Sess., 54 (1967).

The Select Committee noted that it had given Powell notice of the matters it would inquire into, that Powell had the right to attend all hearings (which would be public) with his counsel, and that the Committee would call witnesses upon Powell's written request and supply a transcript of the hearings. *Id.*, at 59.

not appear at the next hearing, held February 14, 1967. However, his attorney was present, and he informed the Committee that Powell would not testify about matters other than his eligibility under the standing qualifications of Art. I, § 2. Powell's attorney reasserted Powell's contention that the standing qualifications were the exclusive requirements for membership, and he further urged that punishment or expulsion was not possible until a member had been seated. See Hearings 111-113.

The Committee held one further hearing at which neither Powell nor his attorneys were present. Then, on February 23, 1967, the Committee issued its report, finding that Powell met the standing qualifications of Art. I, § 2. H. R. Rep. No. 27, 90th Cong., 1st Sess., 31 (1967). However, the Committee further reported that Powell had asserted an unwarranted privilege and immunity from the processes of the courts of New York; that he had wrongfully diverted House funds for the use of others and himself; and that he had made false reports on expenditures of foreign currency to the Committee on House Administration. *Id.*, at 31-32. The Committee recommended that Powell be sworn and seated as a member of the 90th Congress but that he be censured by the House, fined \$40,000 and be deprived of his seniority. *Id.*, at 33.

The report was presented to the House on March 1, 1967, and the House debated the Select Committee's proposed resolution. At the conclusion of the debate, by a vote of 222 to 202 the House rejected a motion to bring the resolution to a vote. An amendment to the resolution was then offered; it called for the exclusion of Powell and a declaration that his seat was vacant. The Speaker ruled that a majority vote of the House would be sufficient to pass the resolution if it were so

amended. 113 Cong. Rec. 1942 (daily ed. March 1, 1967). After further debate, the amendment was adopted by a vote of 248 to 176. Then the House adopted by a vote of 307 to 116 House Resolution No. 278 in its amended form, thereby excluding Powell and directing that the Speaker notify the Governor of New York that the seat was vacant.

Powell and 13 voters of the 18th Congressional District of New York subsequently instituted this suit in the United States District Court for the District of Columbia. Five members of the House of Representatives were named as defendants individually and "as representatives of a class of citizens who are presently serving . . . as members of the House of Representatives." John W. McCormack was named in his official capacity as Speaker, and the Clerk of the House of Representatives, the Sergeant-at-Arms and the Doorkeeper were named individually and in their official capacities. The Complaint alleged that House Resolution No. 278 violated the Constitution, specifically Art. I, § 2, cl. 1, because the resolution was inconsistent with the mandate that the members of the House shall be elected by the people of each State, and Art. I, § 2, cl. 2, which, petitioners alleged, sets forth the exclusive qualifications for membership.² The Complaint further alleged that the Clerk of the House threatened to refuse to perform the service for Powell to which a duly-elected Congressman is entitled, that the Sergeant-at-Arms refused to pay Powell his salary, and that the Doorkeeper threatened to deny Powell admission to the House Chamber.

² The complaint also attacked the House Resolution as a bill of attainder, an *ex post facto* law and as cruel and unusual punishment. Further, petitioners charged that the hearing procedures adopted by the Select Committee violated the Due Process Clause of the Fifth Amendment.

* Petitioners asked that a three-judge court be convened.³ Further, they requested the District Court grant a permanent injunction restraining respondents from executing the House Resolution, and enjoining the Speaker from refusing to administer the oath, the Clerk from refusing to perform the duties due a Representative, the Sergeant-at-Arms from refusing to pay Powell his salary and the Doorkeeper from refusing to admit Powell to the Chamber.⁴ The complaint also requested a declaratory judgment that Powell's exclusion was unconstitutional.

The District Court granted respondents' motion to dismiss the complaint "for want of jurisdiction of the subject matter." *Powell v. McCormack*, 266 F. Supp. 354 (D. C. D. C. 1967).⁵ The Court of Appeals for the District of Columbia Circuit affirmed on somewhat different grounds, with each judge filing a separate opinion. *Powell v. McCormack*, 129 U. S. App. D. C. 354, 395 F. 2d 577 (C. A. D. C. Cir. 1968). We granted certiorari. 393 U. S. 949 (1968). While the case was pending on our docket, the 90th Congress officially terminated and the 91st Congress was seated. In November 1968, Powell had again been elected as the representative of the 18th Congressional District of New York, and he was seated by the 91st Congress. The resolution seating

³ The District Court refused to convene a three-judge court and the Court of Appeals affirmed. Petitioners did not press this issue in their petition for writ of certiorari, apparently recognizing the Validity of the Court of Appeals' ruling. See *Stamler v. Willis*, 393 U. S. 217 (1969).

⁴ Petitioners also requested that a writ of mandamus issue ordering that the named officials perform the same acts.

⁵ The District Court entered its order April 7, 1967, and a notice of appeal was filed the same day. On April 11, 1967, Powell was reelected to the House of Representatives in a special election called to fill his seat. The formal certification of election was received by the House on May 1, 1967, but Powell did not again present himself to the House or ask to be given the oath of office.

Powell also fined him \$25,000. See H. R. Res. No. 2, 91st Cong., 1st Sess., 115 Cong. Rec. 21 (daily ed., January 3, 1969). Respondents then filed a suggestion of mootness. We postponed further consideration of this suggestion to a hearing on the merits. 393 U. S. 1060 (1969).

Respondents press upon us a variety of arguments to support the court below; they will be considered in the following order. (1) Events occurring subsequent to the grant of certiorari have rendered this litigation moot. (2) The Speech or Debate Clause of the Constitution, Art. I, § 6, insulates respondents' action from judicial review. (3) The decision to exclude Petitioner Powell is supported by the power granted to the House of Representatives to expel a member. (4) This Court lacks subject matter jurisdiction over petitioners' action. (5) Even if subject matter jurisdiction is present; this litigation is not justiciable either under the general criteria established by this Court or because a political question is involved.

II.

MOOTNESS.

After certiorari was granted, respondents filed a memorandum suggesting that two events which occurred subsequent to our grant of certiorari require that the case be dismissed as moot. On January 3, 1969, the House of Representatives of the 90th Congress officially terminated, and Petitioner Powell was seated as a member of the 91st Congress. 115' Cong. Rec. 22 (daily ed., January 3, 1969). Respondents insist that the gravamen of petitioners' complaint was the failure of the 90th Congress to seat Petitioner Powell and that, since the House of Representatives is not a continuing body*

* Respondents' authority for this assertion is a footnote contained in *Gojack v. United States*, 384 U. S. 702, 707, n. 4. (1966): "Neither the House of Representatives nor its committees are continuing bodies."

and Powell has now been seated, his claims are moot. Petitioners counter that three issues remain unresolved and thus this litigation presents a "case or controversy" within the meaning of Art. III:⁷ (1) whether Powell was unconstitutionally deprived of his seniority by his exclusion from the 90th Congress; (2) whether the resolution of the 91st Congress imposing as "punishment" a \$25,000 fine is a continuation of respondents' allegedly unconstitutional exclusion, see H. R. Res. No. 2, 91st Cong., 1st Sess., 115 Cong. Rec. 21 (daily ed., January 3, 1969); and (3) whether Powell is entitled to salary withheld after his exclusion from the 90th Congress. We conclude that Powell's claim for back salary remains viable even though he has been seated in the 91st Congress and thus find it unnecessary to determine whether the other issues have become moot.⁸

Simply stated, a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. See E. Borchard, *Declara-*

⁷ The rule that this Court lacks jurisdiction to consider the merits of a moot case is a branch of the constitutional command that the judicial power extends only to cases or controversies. See *Sibron v. New York*, 392 U. S. 40, 57 (1968); R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States* §§ 270-271 (R. Wolfson & P. Kurland ed., 1951); S. Diamond, *Federal Jurisdiction To Decide Moot Cases*, 94 U. Pa. L. Rev. 125 (1946); Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955).

⁸ Petitioners do not press their claim that respondent McCormack should be required to administer the oath to Powell, apparently conceding that the seating of Powell has rendered this specific claim moot. Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests. See *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 353 (1922). Respondents also argue that the seating of Petitioner Powell has mooted the claims of Powell's constituents. Since this case will be remanded, that issue as well as petitioners' other claims can be disposed of by the court below.

tory Judgments 35-37 (2d ed. 1941). Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy. See *United Public Workers v. Mitchell*, 330 U. S. 75, 86-94 (1947); 6A, J. Moore, *Federal Practice* ¶ 57.13 (2d ed. 1966). Despite Powell's obvious and continuing interest in his withheld salary, respondents insist that *Aleandrino v. Quezon*, 271 U. S. 528 (1926), leaves us no choice but to dismiss this litigation as moot. Aleandrino, a duly appointed Senator of the Philippine Islands, was suspended for one year by a resolution of the Philippine Senate and deprived of all "prerogatives, privileges and emoluments" for the period of his suspension. The Supreme Court of the Philippines refused to enjoin the suspension. By the time the case reached this Court, the suspension had expired and the Court dismissed as moot Aleandrino's request that the suspension be enjoined. Then, *sua sponte*,⁹ the Court considered whether the possibility that Aleandrino was entitled to back salary required it "to retain the case for the purpose of determining whether he [Aleandrino] may not have a mandamus for this purpose." *Id.*, at 533. Characterizing the issue of Aleandrino's salary as a "mere incident" to his claim that the suspension was improper, the Court noted that he had not briefed the salary issue and that his request for mandamus did not set out with sufficient clarity the official or set of officials against whom the mandamus should issue. *Id.*, at 533-534. The Court therefore refused to treat the salary claim and dismissed the entire action as moot.

⁹ Aleandrino's brief did not consider either the possibility that his request for injunctive relief had become moot or whether his salary claim required that the Court treat the propriety of his suspension. No brief was filed on behalf of respondents.

Respondents believe that Powell's salary claim is also a "mere incident" to his insistence that he was unconstitutionally excluded so that we should likewise dismiss this entire action as moot. This argument fails to grasp that the reason for the dismissal in *Alejandrino* was not that Alejandrino's deprivation of salary was insufficiently substantial to prevent the case from becoming moot, but rather that his failure to plead sufficient facts to establish his mandamus claim made it impossible for any court to resolve the mandamus request.¹⁰ By contrast, petitioners' complaint names the official responsible for the payment of congressional salaries and asks for both mandamus and an injunction against that official.¹¹

Futhermore, even if respondents are correct that Powell's averments as to injunctive relief are not sufficiently definite, it does not follow that this litigation must be dismissed as moot. Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties. Declaratory relief has been requested, a form of relief not available

¹⁰ After discussing the insufficiency of Alejandrino's averments as to the officer responsible for his salary, the Court stated: "Were that set out, the remedy of the Senator would seem to be by mandamus to compel such official in the discharge of his ministerial duty to pay him the salary due . . ." 271 U. S., at 534. That the insufficiency of Alejandrino's averments was the reason for dismissal is further substantiated by a later passage: "As we are not able to derive from the petition sufficient information upon which properly to afford such a remedy [mandamus], we must treat the whole case as moot and act accordingly." *Id.*, at 535.

¹¹ Paragraph 18b of petitioners' complaint avers that "Leake W. Johnson, as Sergeant-at-Arms of the House" is responsible for and refuses to pay Powell's salary and prays for an injunction restraining the Sergeant-at-Arms from implementing the House resolution depriving Powell of his salary as well as mandamus to order that the salary be paid.

when *Aleandrino* was decided.¹² A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus. See *United Public Workers v. Mitchell*, *supra*, at 93; cf. *United States v. California*, 332 U. S. 19, 25-26 (1947). A declaratory judgment can then be used as a predicate to further relief, including an injunction. 28 U. S. C. § 2202 (1964 ed.); see *Vermont Structural Slate Co. v. Tatko Brothers Slate Co.*, 253 F. 2d 29 (C. A. 2d Cir. 1958); *United States Lines Co. v. Shaughnessy*, 195 F. 2d 385 (C. A. 2d Cir. 1952). *Aleandrino* stands only for the proposition that, where one claim has become moot and the pleadings are insufficient to determine whether the plaintiff is entitled to another remedy, the action should be dismissed as moot.¹³ There is no suggestion that Powell's averments as to declaratory relief are insufficient and his allegedly unconstitutional deprivation of salary remains unresolved.

Respondents further argue that Powell's "wholly incidental and subordinate" demand for salary is insufficient to prevent this litigation from becoming moot. They suggest that the "primary and principal relief" sought was the seating of Petitioner Powell in the 90th Congress rendering his presumably secondary claims not worthy of judicial consideration. *Bond v. Floyd*, 385 U. S. 116 (1966), rejects respondents' theory that the mootness of a "primary" claim requires a conclusion that all "secondary" claims are moot. At the *Bond* oral argument it was suggested that the expiration of the session of the Georgia Legislature which excluded Bond had rendered

¹² Federal courts were first empowered to grant declaratory judgments in 1934, see 48 Stat. 955, 10 years after *Aleandrino* filed his complaint.

¹³ It was expressly stated in *Aleandrino* that a properly pleaded mandamus action could be brought, 271 U. S., at 535, impliedly holding that *Aleandrino's* salary claim had not been mooted by the expiration of his suspension.

the case moot. We replied: "The State has not pressed this argument, and it could not do so, because the State has stipulated that if Bond succeeds on this appeal he will receive back salary for the term from which he was excluded." 385 U. S., at 128, n. 4. *Bond* is not controlling, argue respondents, because the legislative term from which Bond was excluded did not end until December 31, 1966,¹⁴ and our decision was rendered December 5; further, when *Bond* was decided, Bond had not as yet been seated while Powell has been.¹⁵ Respondents do not tell us, however, why these factual distinctions create a legally significant difference between *Bond* and this case. We relied in *Bond* on the outstanding salary claim not the facts respondents stress to hold that the case was not moot.

Finally, respondents seem to argue that Powell's proper action to recover salary is a suit in the Court of Claims, so that, having brought the wrong action, a dismissal for mootness is appropriate. The short answer to this argument is that it confuses mootness with whether Powell has established a right to recover against the Sergeant-at-Arms, a question which is inappropriate to treat at this stage of the litigation.¹⁶

¹⁴ Respondents do not supply any substantiation for their assertion that the term of the Georgia Legislature did not expire until December 31. Presumably, they base their statement upon Ga. Code Ann. §§ 2-1601, 2-1603 (Supp. 1968).

¹⁵ Respondents also suggest that *Bond* is not applicable because the parties in *Bond* had stipulated that Bond would be entitled to back salary if his constitutional challenges were accepted, while there is no stipulation in this case. However, if the claim in *Bond* was moot, a stipulation by the parties could not confer jurisdiction. See, e. g., *California v. San Pablo and Tulare Railroad Co.*, 149 U. S. 308, 314 (1893).

¹⁶ Since the court below disposed of this case on grounds of justiciability, it did not pass upon whether Powell had brought an appropriate action to recover his salary. Where a court of

III.

SPEECH OR DEBATE CLAUSE.

Respondents assert that the Speech or Debate Clause of the Constitution, Art. I, § 6,¹⁷ is an absolute bar to petitioners' action. This Court has on four prior occasions—*Dombrowski v. Eastland*, 387 U. S. 82. (1967); *United States v. Johnson*, 383 U. S. 169 (1966); *Tenney v. Brandhove*, 341 U. S. 367 (1951); and *Kilbourn v. Thompson*, 103 U. S. 168 (1880)—been called upon to determine if allegedly unconstitutional action taken by legislators or legislative employees is insulated from judicial review by the Speech or Debate Clause. Both parties insist that their respective positions find support in these cases and tender for decision three distinct issues: (1) whether respondents in participating in the exclusion of Petitioner Powell were "acting in the sphere of legitimate legislative activity," *Tenney v. Brandhove*, *supra*, at 376; (2) assuming that respondents were so acting, does the fact that petitioners seek neither damages from any of the respondents nor a criminal prosecution lift the bar of the clause;¹⁸ and (3) even if this

appeals has misconceived the applicable law and therefore failed to pass upon a question, our general practice has been to remand the case to that court for consideration of the remaining issues. See, e. g., *Utah Pie Co. v. Continental Baking Co.*, 386 U. S. 685, 704 (1967); *Bank of America National Trust & Savings Assn. v. Parnell*, 352 U. S. 29, 34 (1956). We believe that such action is appropriate for resolution of whether Powell in this litigation is entitled to mandamus against the Sergeant-at-Arms for salary withheld pursuant to the House resolution.

¹⁷ Article I, § 6, provides: "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place."

¹⁸ Petitioners ask the Court to draw a distinction between declaratory relief sought against members of Congress and either an action for damages or a criminal prosecution, emphasizing that our four previous cases concerned "criminal or civil sanctions of a deterrent nature." Brief for Petitioners, at 171.

action may not be maintained against a Congressman, may those respondents who are merely employees of the House plead the bar of the clause. We find it necessary to treat only the last of these issues.

The Speech or Debate Clause, adopted by the Constitutional Convention without debate or opposition,¹⁹ finds its roots in the conflict between Parliament and the Crown culminating in the Glorious Revolution of 1688 and the English Bill of Rights of 1689.²⁰ Drawing upon this history, we concluded in *United States v. Johnson*, *supra*, at 181, that the purpose of this clause was "to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary." Although the clause sprung from a fear of seditious libel actions instituted by the Crown to punish unfavorable speeches made in Parliament,²¹ we have held that it would be a "narrow view" to confine the protection of the Speech or Debate Clause to words spoken in debate. Committee reports, resolutions, and the act of voting are equally covered, as are "things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, *supra*, at 204. Furthermore, the clause provides not only a

¹⁹ See 5 Debates on the Federal Constitution 406 (J. Elliot ed. 1876); 2 Records of the Federal Convention 246 (Farrand rev. ed. 1966) (hereinafter cited as Farrand).

²⁰ The English Bill of Rights contained a provision substantially identical to Art. I, § 6: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2. The English and American colonial history is traced in some detail in A. Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suffolk U. L. Rev. 1, 3-16 (1968), and L. Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. Pa. L. Rev. 960, 961-966 (1951).

²¹ *United States v. Johnson*, 383 U. S. 169, 182-183 (1966).

defense on the merits but also protects a legislator from the burden of defending himself. *Dombrowski v. Eastland*, *supra*, at 85; see *Tenney v. Brandhove*, *supra*, at 377.

Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation. Thus, in *Tenney v. Brandhove*, *supra*, at 373, the Court quoted the writings of James Wilson as illuminating the reason for legislative immunity: "In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence."²²

Legislative immunity does not, of course, bar all judicial review of legislative acts. That issue was settled by implication as early as 1803, see *Marbury v. Madison*, 1 Cranch 137, and expressly in *Kilbourn v. Thompson*, the first of this Court's cases interpreting the reach of the Speech or Debate Clause. Challenged in *Kilbourn* was the constitutionality of a House resolution ordering the arrest and imprisonment of a recalcitrant witness who had refused to respond to a subpoena issued by a House investigating committee. While holding that the Speech or Debate Clause barred Kilbourn's action for false imprisonment brought against several members of the House, the Court nevertheless reached the merits of Kilbourn's attack and decided that, since the House had no power to punish for contempt, Kilbourn's imprisonment

²² 1 The Works of James Wilson 421 (McCloskey ed. 1967).

pursuant to the resolution was unconstitutional. It therefore allowed Kilbourn to bring his false imprisonment action against Thompson, the House's Sergeant-at-Arms, who had executed the warrant for Kilbourn's arrest.

The Court first articulated in *Kilbourn* and followed in *Dombrowski v. Eastland*²³ the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts. Despite the fact that petitioners brought this suit against several House employees—the Sergeant-at-Arms, the Doorkeeper and the Clerk—as well as several Congressmen, respondents argue that *Kilbourn* and *Dombrowski* are distinguishable. Conceding that in *Kilbourn* the presence of the Sergeant-at-Arms and in *Dombrowski* the presence of a congressional subcommittee counsel as defendants in the litigation allowed judicial review of the challenged congressional action, respondents urge that both cases concerned an affirmative act performed by the employee outside the House having a direct effect upon a private citizen. Here, they continue, the relief sought relates to actions taken by House agents solely within the House. Alternatively, respondents insist that Kilbourn and Dombrowski prayed for damages while Petitioner Powell asks that the Sergeant-at-Arms disburse funds, an assertedly greater interference with the legislative process. We reject the proffered distinctions.

That House employees are acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision.

²³ In *Dombrowski* \$500,000 in damages was sought against a Senator and the chief counsel of a Senate Subcommittee chaired by that Senator. Record, pp. 10-11. We affirmed the grant of summary judgment as to the Senator but reversed as to subcommittee counsel.

Kilbourn decisively settles this question, since the Sergeant-at-Arms was held liable for false imprisonment even though he did nothing more than execute the House resolution that *Kilbourn* be arrested and imprisoned.²⁴ Respondents' suggestions thus ask us to distinguish between affirmative acts of House employees and situations in which the House orders its employees not to act or between actions for damages and claims for salary. We can find no basis in either the history of the Speech or Debate Clause or our cases for either distinction. The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions. A legislator is no more or no less hindered or distracted by litigation against a legislative employee calling into question the employee's affirmative action than he would be by a lawsuit questioning the employee's failure to act. Nor is the distraction or hindrance increased because the claim is for salary rather than damages, or because the litigation questions action taken by the employee within rather than without the House. Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves.²⁵ In *Kilbourn* and *Dombrowski*

²⁴ The Court in *Kilbourn* quoted extensively from *Stockdale v. Hansard*, 9 AD. & E. 1, 114, 112 Eng. Rep. 1112, 1156 (Q. B. 1839), to refute the assertion that House agents were immune because they were executing orders of the House: "[I]f the Speaker, by authority of the House, order an illegal Act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles's warrant for levying ship-money could justify his revenue officer." *Kilbourn* eventually recovered \$20,000 against Thompson. See *Kilbourn v. Thompson*, 11 D. C. (MacArth. & M.) 401, 432 (Sup. Ct. 1883).

²⁵ A Congressman is not by virtue of the Speech or Debate Clause absolved of the responsibility of filing a motion to dismiss and the

We thus dismissed the action against members of Congress but did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. Similarly, this action may be dismissed against the Congressmen since petitioners are entitled to maintain their action against House employees and to judicial review of the propriety of the decision to exclude Petitioner Powell.²⁶ As was said in *Kilbourn*, in language which time has not dimmed:

"Especially is it competent and proper for this court to consider whether its [the legislature's] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void." 103 U. S., at 199.

IV.

EXCLUSION OR EXPULSION.

The resolution excluding Petitioner Powell was adopted by a vote in excess of two-thirds of the 434 Members of

trial court must still determine the applicability of the clause to plaintiff's action. See *Tenney v. Brandhove*, 341 U. S. 367, 377 (1951).

²⁶ Given our disposition of this issue, we need not decide whether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against members of Congress where no agents participated in the challenged action and no other remedy was available. Cf. *Kilbourn v. Thompson*, 103 U. S. 168, 204-205 (1880).

Congress—307 to 116. 113 Cong. Rec. 1956-1957 (daily ed. March 1, 1967). Article I, § 5, grants the House authority to expel a member "with the Concurrence of two thirds."²⁷ Respondents assert that the House may expel a member for any reason whatsoever and that, since a two-thirds vote was obtained, the procedure by which Powell was denied his seat in the 90th Congress should be regarded as an expulsion not an exclusion. Cautioning us not to exalt form over substance, respondents quote from the concurring opinion of Judge McGowan in the court below:

"Appellant Powell's cause of action for a judicially compelled seating thus boils down, in my view, to the narrow issue of whether a member found by his colleagues . . . to have engaged in official misconduct must, because of the accidents of timing, be formally admitted before he can be either investigated or expelled. The sponsor of the motion to exclude stated on the floor that he was proceeding on the theory that the power to expel included the power to exclude, provided a $\frac{2}{3}$ vote was forthcoming. It was. Therefore, success for Mr. Powell on the merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade." 129 U. S. App. D. C., at 383-384, 395 F. 2d, at 606-607.

²⁷ Powell was "excluded" from the 90th Congress, i. e., he was not administered the oath of office and was prevented from taking his seat. If he had been allowed to take the oath and subsequently had been required to surrender his seat, the House's action would have constituted an "expulsion." Since we conclude that Powell was excluded from the 90th Congress, we express no view on what limitations may exist on Congress' power to expel or otherwise punish a member once he has been seated.

Although respondents repeatedly urge this Court not to speculate as to the reasons for Powell's exclusion, their attempt to equate exclusion with expulsion would require a similar speculation that the House would have voted to expel Powell had it been faced with that question. Powell had not been seated at the time House Resolution 278 was debated and passed. After a motion to bring the Select Committee's proposed resolution to an immediate vote had been defeated, an amendment was offered which mandated Powell's exclusion.²⁸ Mr. Celler, chairman of the Select Committee, then posed a parliamentary inquiry to determine whether a two-thirds vote was necessary to pass the resolution if so amended "in the sense that it might amount to an expulsion." 113 Cong. Rec. 1942 (daily ed., March 1, 1967). The Speaker replied that "action by a majority vote would be in accordance with the rules." *Ibid.* Had the amendment been regarded as an attempt to expel Powell, a two-thirds vote would have been constitutionally required. The Speaker ruled that the House was voting to exclude Powell, and we will not speculate what the result might have been if Powell had been seated and expulsion proceedings subsequently instituted.

Nor is the distinction between exclusion and expulsion merely one of form. The misconduct for which Powell was charged occurred prior to the convening of the 90th Congress. On several occasions the House has debated whether a member can be expelled for actions taken during a prior Congress and the House's own manual of procedure applicable in the 90th Congress states that "both Houses have distrusted their power to punish in such cases." Rules of the House of Representatives, H. R. Doc. No. 529, 89th Cong., 2d Sess., 25 (1967);

²⁸ House Resolution 278, as amended and adopted, provided "That said Adam Clayton Powell . . . be and the same hereby is *excluded* from membership in the 90th Congress . . ." 113 Cong. Rec. 1942 (daily ed. March 1, 1967). (Emphasis added.)

see G. Galloway, History of the House of Representatives 32 (1961). The House rules manual reflects positions taken by prior Congresses. For example, the report of the Select Committee appointed to consider the expulsion of John W. Langley states unequivocally that the House will not expel a member for misconduct committed during an earlier Congress.

"[I]t must be said that with practical uniformity the precedents in such cases are to the effect that the House will not expel a Member for reprehensible action prior to his election as a Member, not even for conviction for an offense. On May, 23, 1884, Speaker Carlisle decided that the House had no right to punish a Member for any offense alleged to have been committed previous to the time when he was elected a Member, and added, 'That has been so frequently decided in the House that it is no longer a matter of dispute.'" H. R. Rep. No. 30, 69th Cong., 1st Sess., 1-2 (1925).²⁹

²⁹ Other Congresses have expressed an identical view. The Report of the Judiciary Committee concerning the proposed expulsion of William S. King and John G. Schumaker informed the House:

"Your committee are of the opinion that the House of Representatives has no authority to take jurisdiction of violations of law or offenses committed against a previous Congress. This is a purely legislative body, and entirely unsuited for the trial of crimes. The fifth section of the first article of the Constitution authorizes 'each house to determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.' This power is evidently given to enable each house to exercise its constitutional function of legislation unobstructed. It cannot vest in Congress jurisdiction to try a member for an offense committed before his election; for such offense a member, like any other citizen, is amenable to the courts alone." H. R. Rep. No. 815, 44th Cong., 1st Sess., 2 (1876).

See also 15 Cong. Rec. 4434 (1884) (ruling of the Speaker); H. R. Rep. No. 81, 42d Cong., 3d Sess., 8 (1873) (expulsion of James Brooks and Oakes Ames); H. R. Rep. No. 179, 35th Cong., 1st Sess., 4-5 (1858) (expulsion of Orsamus B. Matteson).

Members of the House having expressed a belief that such strictures apply to its own power to expel, we will not assume that two-thirds of its members would have expelled Powell for his prior conduct had the Speaker announced that House Resolution 278 was for expulsion rather than exclusion.³⁰

Finally, the proceedings which culminated in Powell's exclusion cast considerable doubt upon respondent's assumption that the two-thirds vote necessary to expel would have been mustered. These proceedings have been succinctly described by Congressman Eckhardt.

"The House voted 202 votes for the previous question³¹ leading toward the adoption of the [Select] Committee report. It voted 222 votes against the previous question, opening the floor for the Curtis Amendment which ultimately excluded Powell.

³⁰ We express no view as to whether such a ruling would have been proper. A further distinction between expulsion and exclusion inheres in the fact that a member whose expulsion is contemplated may as a matter of right address the House and participate fully in debate while a member-elect apparently does not have a similar right. In prior cases the member whose expulsion was under debate has been allowed to make a long and often impassioned defense. See Cong. Globe, 42d Cong., 3d Sess., 1723 (1873) (expulsion of Oakes Ames); Cong. Globe, 41st Cong., 2d Sess., 1524-1525, 1544 (1870) (expulsion of B. F. Whittemore); Cong. Globe, 34th Cong., 3d Sess., 925-926 (1857) (expulsion of William A. Gilbert); Cong. Globe, 34th Cong., 3d Sess., 947-951 (1857) (expulsion of William W. Welch); 9 Annals of Cong. 2966 (1799) (expulsion of Matthew Lyon). On at least one occasion the member has been allowed to cross-examine other members during the expulsion debate. 2 A. Hinds, Precedents of the House of Representatives § 1643 (1907).

³¹ A motion for the previous question is a debate-limiting device which, when carried, has the effect of terminating debate and of forcing a vote on the subject at hand. See Rules of the House of Representatives, H. R. Doc. No. 529, 89th Cong., 2d Sess., §§ 804-809 (1967); Cannon's Procedure in the House of Representatives, H. R. Doc. No. 610, 87th Cong., 2d Sess., 277-281 (1963).

"Upon adoption of the Curtis Amendment, the vote again fell short of two-thirds, being 248 yeas to 176 nays. Only on the final vote, adopting the Resolution as amended, was more than a two-thirds vote obtained, the vote being 307 yeas to 116 nays. On this last vote, as a practical matter, members who would not have denied Powell a seat if they were given the choice to punish him had to cast an aye vote or else record themselves as opposed to the only punishment that was likely to come before the House. Had the matter come up through the processes of expulsion, it appears that the two-thirds vote would have failed, and then members would have been able to apply a lesser penalty."³²

We need express no opinion as to the accuracy of Congressman Eckhardt's prediction that expulsion proceedings would have produced a different result. However, the House's own views of the extent of its power to expel

³² R. Eckhardt; *The Adam Clayton Powell Case*, 45 Tex. L. Rev. 1205, 1209 (1967). The views of Congressman Eckhardt were echoed during the exclusion proceedings. Congressman Cleveland stated that, although he voted in favor of and supported the Select Committee's recommendation, if the exclusion amendment received a favorable vote on the motion for the previous question, then he would support the amendment "on final passage." 113 Cong. Rec. 1952-1953 (daily ed. March 1, 1967). Congressman Gubser was even more explicit:

"I shall vote against the previous question on the Curtis amendment simply because I believe future and perfecting amendments should be allowed. But if the previous question is ordered, then I will be placed on the horns of an impossible dilemma."

"Mr. Speaker; I want to expel Adam Clayton Powell, by seating him first, but that will not be my choice when the Curtis amendment is before us. I will be forced to vote for exclusion, about which I have great constitutional doubts, or to vote for no punishment at all. Given this raw and isolated issue, the only alternative I can follow is to vote for the Curtis amendment. I shall do so, Mr. Speaker, with great reservation." *Id.*, at 1953.

combined with the Congressman's analysis-counsel that exclusion and expulsion are not fungible proceedings. The Speaker ruled that House Resolution 278 contemplated an exclusion proceeding. We must decline respondents' suggestion that we overrule the Speaker and hold that, although the House manifested an intent to exclude Powell, its action should be tested by whatever standards may govern an expulsion.

V.

SUBJECT MATTER JURISDICTION.

As we pointed out in *Baker v. Carr*, 369 U. S. 186, 198 (1962), there is a significant difference between determining whether a federal court has "jurisdiction over the subject matter" and determining whether a cause over which a court has subject matter jurisdiction is "justiciable." The District Court determined that "to decide this case on the merits . . . would constitute a clear violation of the doctrine of separation of powers" and then dismissed the complaint "for want of jurisdiction of the subject matter." *Powell v. McCormack*, 266 F. Supp. 354, 359, 360 (D. C. D. C. 1967). However, as the Court of Appeals correctly recognized, the doctrine of separation of powers is more properly considered in determining whether the case is "justiciable." We agree with the unanimous conclusion of the Court of Appeals that the District Court had jurisdiction over the subject matter of this case.³³ However, for reasons set forth in Part VI, *infra*, we disagree with the Court of Appeals' conclusion that this case is not justiciable.

In *Baker v. Carr*, *supra*, we noted that a federal district court lacks jurisdiction over the subject matter (1) if the

³³ Although each judge wrote a separate opinion, all were clear in stating that the District Court possessed subject matter jurisdiction. *Powell v. McCormack*, 129 U. S. App. D. C. 354, 368, 384, 385; 395 F. 2d 577, 591, 607, 608 (C. A. D. C. Cir. 1968).

cause does not "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Article III); or (2) if it is not a "case or controversy" within the meaning of that phrase in Article III; or (3) if the cause is not one described by any jurisdictional statute. And, as in *Baker v. Carr*, *supra*, our determination (see Part VI, § B (1) *infra*) that this cause presents no nonjusticiable "political question" disposes of respondents' contentions³⁴ that this cause is not a "case or controversy."³⁵

Respondents first contend that this is not a case "arising under" the Constitution within the meaning of Article III. They emphasize that Art. I, § 5, assigns to each house of Congress the power to judge the elections and qualifications of its own members and to punish its members for disorderly behavior. Respondents also note that under Art. I, § 3, the Senate has the "sole power" to try all impeachments. Respondents argue that these delegations (to "judge," to "punish," and to "try") to the Legislative Branch are explicit grants of "judicial power" to the Congress and constitute specific exceptions

³⁴ We have determined that the case is not moot. See Part II, *supra*.

³⁵ Indeed, the thrust of respondents' argument on this jurisdictional issue is similar to their contentions that this case presents a nonjusticiable "political question." They urge that it would have been "unthinkable" to the Framers of the Constitution for courts to review the decision of a legislature to exclude a member. However, we have previously determined that a claim alleging that a legislature has abridged an individual's constitutional rights by refusing to seat an elected representative constitutes a "case or controversy" over which federal courts have jurisdiction. See *Bond v. Floyd*, 385 U. S. 116, 131 (1966). To the extent the expectations of the Framers are discernible and relevant to this case, they must therefore relate to the special problem of review by federal courts of actions of the federal legislature. This is of course a problem of separation of powers and is to be considered in determining justiciability. See *Baker v. Carr*, 369 U. S. 186, 210 (1962).

to the general mandate of Article III that the "judicial power" shall be vested in the federal courts. Thus, respondents maintain, the "power conferred on the courts by article III does not authorize this Court to do anything more than declare its lack of jurisdiction to proceed."³⁶

/ We reject this contention. Article III, §1, provides the "judicial Power . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may . . . establish." Further, §2 mandates that the "judicial Power shall extend to all Cases . . . arising under this Constitution. . . ." It has long been held that a suit "arises under" the Constitution if petitioners' claims "will be sustained if the Constitution . . . [is] given one construction and will be defeated if it [is] given another."³⁷ *Bell v. Hood*, 327 U. S. 678, 685 (1946). See *King County v. Seattle School District No. 1*, 263 U. S. 361, 363-364 (1923). Cf. *Osborn v. Bank of the United States*, 22 U. S. (9 Wheat.) 738 (1824). See generally, C. Wright, *Federal Courts* 48-52 (1963). Thus, this case clearly is one "arising under" the Constitution as the Court has interpreted that phrase. Any bar to federal courts reviewing the judgments made by the House or Senate in excluding a member arises from the allocation of powers between the two branches of the Federal Government (a question of justiciability), and not from the petitioners' failure to state a claim based on federal law.

Respondents next contend that the Court of Appeals erred in ruling that petitioners' suit is "authorized by a jurisdictional statute," i. e., 28 U. S. C. § 1331 (a) (1964

³⁶ Brief for Respondents, at 39.

³⁷ Petitioners' complaint is predicated, *inter alia*, on several sections of Article I, Article III, and several amendments to the Constitution. Respondents do not challenge the substantiality of these claims.

ed.). Section 1331 (a) provides that district courts shall have jurisdiction in "all civil actions wherein the matter in controversy . . . arises under the Constitution" Respondents urge that even though a case may "arise under the Constitution" for purposes of Article III, it does not necessarily "arise under the Constitution" for purposes of § 1331 (a). Although they recognize there is little legislative history concerning the enactment of § 1331 (a), respondents argue that the history of the period when the section was first enacted indicates that the drafters did not intend to include suits questioning the exclusion of Congressmen in this grant of "federal question" jurisdiction.

Respondents claim that the passage of the Force Act³⁸ in 1870 lends support to their interpretation of the intended scope of § 1331. The Force Act gives the district courts jurisdiction over "any civil action to recover possession of any office . . . wherein it appears the sole question . . . arises out of the denial of the right to vote . . . on account of race, color or previous condition of servitude." However, the Act specifically excludes suits concerning the office of Congressman. Respondents maintain that this exclusion demonstrates Congress' intention to prohibit federal courts from entertaining suits regarding the seating of Congressmen.

We have noted that the grant of jurisdiction in § 1331 (a), while made in the language used in Article III, is not in all respects coextensive with the potential for federal jurisdiction found in Article III. See *Zwicker v. Koota*, 389 U. S. 241, 246, n. 8 (1967). Nevertheless, it has generally been recognized that the intent of the drafters was to provide a broad jurisdictional grant to the federal courts. See, e. g., P. Mishkin, *The Federal "Question" in the District Courts*, 53 Col.

³⁸ Act of May 31, 1870, c. 114, 16 Stat. 146. The statute is now 28 U. S. C. § 1344 (1964 ed.).

L. Rev. 157, 160 (1953); J. Chadbourn and A. Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639, 644-645 (1942). And, as noted above, the resolution of this case depends directly on construction of the Constitution. The Court has consistently held such suits are authorized by the statute. *Bell v. Hood*, *supra*; *King County v. Seattle School District No. 1*, *supra*. See, e. g., *Gully v. First Nat'l Bank in Meridian*, 299 U. S. 109, 112 (1936); *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, 25 (1913).

As respondents recognize, there is nothing in the wording or legislative history of § 1331 or in the decisions of this Court which would indicate that there is any basis for the interpretation they would give that section. Nor do we think the passage of the Force Act indicates that § 1331 does not confer jurisdiction in this case. The Force Act is limited to election challenges where a denial of the right to vote in violation of the Fifteenth Amendment is alleged. See 28 U. S. C. § 1344 (1964 ed.). Further, the Act was passed five years before the original version of § 1331 was enacted. While it might be inferred that Congress intended to give each House the exclusive power to decide congressional election challenges,³⁹ there is absolutely no indication that the passage of this Act evidences an intention to impose other restrictions on the broad grant of jurisdiction in § 1331.

VI.

JUSTICIABILITY.

Having concluded that the Court of Appeals correctly ruled that the District Court had jurisdiction over the subject matter, we turn to the question whether the case is justiciable. Two determinations must be made in this regard. First, we must decide whether the claim

³⁹ See Cong. Globe, 41st Cong., 2d Sess., 3872 (1870).

presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a "political question"—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution.

A. *General Considerations.*

In deciding generally whether a claim is justiciable, a court must determine whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker v. Carr, supra*, at 198. Respondents do not seriously contend that the duty asserted and its alleged breach cannot be judicially determined. If petitioners are correct, the House had a duty to seat Powell once it determined he met the standing requirements set forth in the Constitution. It is undisputed that he met those requirements and that he was nevertheless excluded.

Respondents do maintain, however, that this case is not justiciable because, they assert, it is impossible for a federal court to "mold effective relief for resolving this case." Respondents emphasize that petitioners asked for coercive relief against the officers of the House, and, they contend, federal courts cannot issue mandamus or injunctions compelling officers or employees of the House to perform specific official acts. Respondents rely primarily on the Speech or Debate Clause to support this contention.

We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment, a form of relief the District Court could have issued. The Declaratory Judgment Act, 28 U. S. C. § 2201 (1964 ed.), provides that a district court may "declare the rights . . . of any interested party . . . whether or not further relief is or could be sought." The

availability of declaratory relief depends on whether there is a live dispute between the parties, *Golden v. Zwickler*, 394 U. S. 103 (1969), and a request for a declaratory relief may be considered independently of whether other forms of relief are appropriate. See *United Public Workers v. Mitchell*, 330 U. S. 75, 93 (1947); 6A J. Moore, *Federal Practice* ¶ 57.08 (3) (2d ed., 1966); cf. *United States v. California*, 332 U. S. 19, 25-26 (1947). We thus conclude that in terms of the general criteria of justiciability, this case is justiciable.

B. Political Question Doctrine.

1. Textually Demonstrable Constitutional Commitment.

Respondents maintain that even if this case is otherwise justiciable, it presents only a political question. It is well-established that the federal courts will not adjudicate political questions. See, e. g., *Coleman v. Miller*, 307 U. S. 433 (1939); *Oetjen v. Central Leather Co.*, 246 U. S. 297 (1918). In *Baker v. Carr*, *supra*, we noted that political questions are not justiciable primarily because of the separation of powers within the Federal Government. After reviewing our decisions in this area, we concluded that on the surface of any case held to involve a political question was at least one of the following formulations:

“a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality

of embarrassment from multifarious pronouncements by various departments on one question." *Id.*, at 217.

Respondents' first contention is that this case presents a political question because under Art. I, § 5, there has been a "textually demonstrable constitutional commitment" to the House of the "adjudicatory power" to determine Powell's qualifications. Thus it is argued that the House, and the House alone, has power to determine who is qualified to be a member.⁴⁰

In order to determine whether there has been a textual commitment to a co-ordinate department of the Government, we must interpret the Constitution. In other words, we must first determine what power the Constitution confers upon the House through Art. I, § 5, before we can determine to what extent, if any, the exercise of that power is subject to judicial review. Re-

⁴⁰ Respondents rely on *Barry v. United States ex rel. Cunningham*, 279 U. S. 597 (1929). *Barry* involved the power of the Senate to issue an arrest warrant to summon a witness to give testimony concerning a senatorial election. The Court ruled that issuance of the warrant was constitutional, relying on the power of the Senate under Art. I, § 5, to be the judge of the elections of its members. Respondents particularly rely on language the Court used in discussing the power conferred by Art. I, § 5. The Court noted that under § 5 the Senate could "render a judgment which is beyond the authority of any other tribunal to review." *Id.*, at 613.

Barry provides no support for respondents' argument that this case is not justiciable, however. First, in *Barry* the Court reached the merits of the controversy, thus indicating that actions allegedly taken pursuant to Art. I, § 5, are not automatically immune from judicial review. Second, the quoted statement is dictum; and, later in the same opinion, the Court noted that the Senate may exercise its power subject "to the restraints imposed by or found in the implications of the Constitution." *Id.*, at 614. Third, of course, the statement in *Barry* leaves open the particular question that must first be resolved in this case: the existence and scope of the textual commitment to the House to judge the qualifications of members.

spondents maintain that the House has broad power under § 5, and, they argue, the House may determine which are the qualifications necessary for membership. On the other hand, petitioners allege that the Constitution provides that an elected representative may be denied his seat only if the House finds he does not meet one of the standing qualifications expressly prescribed by the Constitution.

If examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine. On the other hand, if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution,⁴¹ further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are

⁴¹ In addition to the three qualifications set forth in Art. I, § 2, Art. I, § 3, cl. 7, authorizes the disqualification of any person convicted in an impeachment proceeding from "any Office of honor, Trust or Profit under the United States"; Art. I, § 6, cl. 2, provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office"; and § 3 of the 14th Amendment disqualifies any person "who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof." It has been argued that each of these provisions, as well as the Guaranty Clause of Article IV and the oath requirement of Art. VI, cl. 3, is no less a "qualification" within the meaning of Art. I, § 5, than those set forth in Art. I, § 2. A. Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. Pub. L. 103, 111-115 (1968). We need not reach this question; however, since both sides agree that Powell was not ineligible under any of these provisions.

"inextricable from the case at bar."⁴² *Baker v. Carr*, *supra*, at 217.

In other words, whether there is a "textually demonstrable constitutional commitment of the issue to a co-ordinate political department of government" and what is the scope of such commitment are questions we must resolve for the first time in this case.⁴³ For, as we pointed out in *Baker v. Carr*, *supra*, "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and is the responsibility of this Court as ultimate interpreter of the Constitution." *Id.*, at 211.

In order to determine the scope of any "textual commitment" under Art. I, § 5, we necessarily must determine the meaning of the phrase to "judge the qualifications of its members." Petitioners argue that the records of the debates during the Constitutional Convention, available commentary from the post-Convention, pre-ratification period, and early congressional applications of Art. I, § 5, support their construction of the section. Respondents insist, however, that a careful examination of the pre-Convention practices of the English Parliament and American colonial assemblies demonstrates that by 1787, a legislature's power to judge the qualifications of its members was generally under-

⁴² Consistent with this interpretation, federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution.

⁴³ Indeed, the force of respondents' other arguments that this case presents a political question depends in great measure on the resolution of the textual commitment question. See Part VI, Section B (2), *infra*.

stood to encompass exclusion or expulsion on the ground that an individual's character or past conduct rendered him unfit to serve. When the Constitution and the debates over its adoption are thus viewed in historical perspective, argue respondents, it becomes clear that the "qualifications" expressly set forth in the Constitution were not meant to limit the long recognized legislative power to exclude or expel at will, but merely to establish "standing incapacities," which could be altered only by a constitutional amendment. Our examination of the relevant historical materials leads us to the conclusion that petitioners are correct and that the Constitution leaves the House "without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.

a. The Pre-Convention Precedents.

Since our rejection of respondents' interpretation of § 5 results in significant measure from a disagreement with their historical analysis, we must consider the relevant historical antecedents in considerable detail. As do respondents, we begin with the English and colonial precedents.

The earliest English exclusion precedent appears to be a declaration by the House of Commons in 1553 "that Alex. Nowell, being Prebendary [*i. e.*, a clergyman] in Westminster, and thereby having voice in the Convocation House, cannot be a member of this House" J. Tanner, *Tudor Constitutional Documents: 1485-1603*, at 596 (2d ed. 1930). This decision, however, was con-

⁴⁴ Since Art. I, § 5, cl. 1, applies to both Houses of Congress, the scope of the Senate's power to judge the qualifications of its members necessarily is identical to the scope of the House's power, with the exception, of course, that Art. I, § 3, cl. 3, establishes different age and citizenship requirements for membership in the Senate.

sistent with a long-established tradition that clergy who participated in their own representative assemblies or convocations were ineligible for membership in the House of Commons.⁴⁵ See 1 E. Porritt, *The Unreformed House of Commons* 125 (1963); Taswell-Langmead's *English Constitutional History* 142-143 (11th ed. T. Plucknett 1960). The traditional ineligibility of clergymen was recognized as a standing incapacity.⁴⁶ See 1 Blackstone's *Commentaries* *175. Nowell's exclusion, therefore, is irrelevant to the present case, for petitioners concede—and we agree—that if Powell had not met one of the standing qualifications set forth in the Constitution, he could have been excluded under Art. I, § 5. The earliest colonial exclusions also fail to support respondents' theory.⁴⁷

⁴⁵ Since the reign of Henry IV (1399-1413), no clergyman had sat in the House of Commons. 1 E. Porritt, *The Unreformed House of Commons* 125 (1903).

⁴⁶ Because the British do not have a written constitution, standing incapacities or disqualifications for membership in Parliament are derived from "the custom and law of parliament." 1 Blackstone's *Commentaries* *162; see *id.*, at *175. The groups thus disqualified as of 1770 included aliens; minors; judges who sat in the House of Lords; clergy who were represented in their own convocation; persons "attainted of treason or felony"; sheriffs, mayors, and bailiffs as representatives for their own jurisdictions; and certain taxing officials and officers of the Crown. *Id.*, at *175-176. Not until the exclusion of John Wilkes, discussed *infra*, did Blackstone subscribe to the theory that, in addition, the Commons could declare ineligible an individual "in particular [unspecified] circumstances . . . for that parliament" if it deemed him unfit to serve on grounds not encompassed by the recognized standing incapacities. As we explain, *infra*, this position was subsequently repudiated by the House in 1782. A Clerk of the House of Commons later referred to cases in which this theory was relied upon "as examples of an excess of . . . jurisdiction by the Commons; for one house of Parliament cannot create a disability unknown to the law." May's *Parliamentary Practice* 67 (13th ed. T. Webster 1924).

⁴⁷ In 1619, the Virginia House of Burgesses challenged the eligibility of certain delegates on the ground that they did not hold their

Respondents' remaining 16th and 17th century English precedents all are cases of expulsion, although some were for misdeeds not encompassed within recognized standing incapacities existing either at the time of the expulsions or at the time the Constitution was drafted in 1787.⁴⁸ Although these early expulsion orders occasionally contained statements suggesting that the individual expelled was thereafter ineligible for re-election, at least for the duration of the Parliament from which he was expelled,⁴⁹

plantations under proper patents from the Virginia Company in England. See generally, 7 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3783-3810 (F. Thorpe ed. 1909) (hereinafter cited as Thorpe). One of them, a Captain Warde, was admitted on condition that he obtain the necessary patent. The others, representatives from Martin's Brandon plantation, were excluded on the ground that the owner of the plantation had claimed that his patent exempted him from the colony's laws. See *Journals of the House of Burgesses of Virginia: 1619-1658/59*, at 4-5 (1915); M. Clarke, *Parliamentary Privilege in the American Colonies* 133-134 (1943). The questions presented by these two cases, therefore, seem to be jurisdictional in nature; that is, an attempt was made to gain representation for plantations over which the assembly may have had no power to act. Thus viewed these cases are analogous to the exclusions for failure to comply with standing qualifications. They certainly are not precedents which support the view that a legislative body could exclude members for mere character defects or prior misconduct disapproved by the assembly. See generally, M. Clarke, *supra*, at 132-204; J. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies: 1689-1776*, at 171-204 (1963).

⁴⁸ For example, in 1585 the Commons expelled a Doctor Parry for unspecified misbehavior. A *Compleat Journal of the Votes, Speeches and Debates of the House of Lords and House of Commons Throughout the Whole Reign of Queen Elizabeth, of Glorious Memory* 352 (D'Ewes ed. 1708); and in 1628 Sir Edmund Sawyer was expelled because he had sought to induce a witness to suppress evidence against Sir Edmund in testimony before the House. 1 H. C. Jour. 917.

⁴⁹ In expelling Sir Edmund Sawyer in 1628, the Commons declared "him to be unworthy ever to serve as a Member of this House."

there is no indication that any were re-elected and thereafter excluded. Respondents' colonial precedents during this period follow a similar pattern.⁵⁰

Apparently the re-election of an expelled member first occurred in 1712. The House of Commons had expelled Robert Walpole for receiving kickbacks for contracts relating to "foraging the Troops," 17 H. C. Jour. 28, and committed him to the Tower. Nevertheless, two months later he was re-elected. The House thereupon resolved "[t]hat Robert Walpole, Esquire, having been, this Session of Parliament, committed a Prisoner to the Tower of London, and expelled [from] this House, . . . is incapable of being elected a Member to serve in this present Parliament" *Id.*, at 128. (Emphasis added in part.) A new election was ordered, and Walpole was not re-elected. At least two similar exclusions after an initial expulsion were effected in the American colonies during the first half of the 18th century.⁵¹

Ibid. Almost identical language was used in the expulsion of H. Benson in 1641. 2 *id.*, at 301. But by 1642, the formula had been changed to "disabled to sit any longer in this Parliament as a Member of this House" *Id.*, at 703. (Emphasis added.) By the 18th century it was apparently well established that an expulsion by the House of Commons could last no longer than the duration of the Parliament from which the member was expelled. See 1 Backstone's Commentaries *176.

⁵⁰ For example, in 1652, the Virginia House of Burgesses expelled two members for prior conduct disapproved by the assembly, Journals of the House of Burgesses, *supra*, at 85; and in 1683, Rhode Island expelled a member "from acting in this present Assembly" for refusing to answer a court summons. 1 S. Arnold, History of the State of Rhode Island and Providence Plantations 289 (1859). See generally, M. Clarke, *supra*, at 173-204.

⁵¹ In 1726, the Massachusetts House of Representatives excluded Gershom Woodlee, who had been expelled on three previous occasions as "unworthy to be a Member." 7 Journals of the House of Representatives of Massachusetts 1726-1727, at 4-5, 15, 68-69 (1926). In 1758, North Carolina expelled Francis Brown for perjury. He

Respondents urge that the Walpole case provides strong support for their conclusion that the pre-Convention English and colonial practice was that members-elect could be excluded for their prior misdeeds at the sole discretion of the legislative body to which they had been elected. However, this conclusion overlooks an important limiting characteristic of the Walpole case and of both the colonial exclusion cases on which respondents rely: the excluded member had been previously expelled. Moreover, Walpole was excluded only for the remainder of the Parliament from which he had been expelled. "The theory seems to have been that expulsion lasted as long as the parliament" Taswell-Langmead's, *supra*, at 584, n. 99. Accord, 1 Blackstone's Commentaries *176. Thus, Walpole's exclusion justifies only the proposition that an expulsion lasted for the remainder of the particular Parliament, and the expelled member was therefore subject to subsequent exclusion if re-elected prior to the next general election. The two colonial cases arguably support a somewhat broader principle, i. e., that the assembly could permanently expel. Apparently the colonies did not consistently adhere to the theory that an expulsion lasted only until the election of a new assembly. M. Clarke, *Parliamentary Privilege in the American Colonies 196-202* (1943).⁵² Clearly, however, none of these cases supports respondents' contention that by the 18th century the English Parliament

was reelected twice in 1760 and excluded on both occasions; however, when he was elected at the 1761 general elections, he was allowed to take his seat. 5 Colonial Records of North Carolina 1057-1058 (1887); 6 *id.*, at 375, 474, 662-663, 672-673 (1888). There may have been similar exclusions of two men elected in 1710 to the New Jersey Assembly. See M. Clarke, *supra*, at 197-198.

⁵² Significantly, the occasional assumption of this broader expulsion power did not go unchallenged, M. Clarke, *supra*, at 196-202; and it was not supported by the only parliamentary precedent, the Walpole case.

and colonial assemblies had assumed absolute discretion to exclude any member-elect they deemed unfit to serve. Rather, they seem to demonstrate that a member could be excluded only if he had first been expelled.

Even if these cases could be construed to support respondents' contention, their precedential value was nullified prior to the Constitutional Convention. By 1782, after a long struggle, the arbitrary exercise of the power to exclude was unequivocally repudiated by a House of Commons resolution which ended the most notorious English election dispute of the 18th century—the John Wilkes case. While serving as a member of Parliament in 1763, Wilkes published an attack on a recent peace treaty with France, calling it a product of bribery and condemning the Crown's ministers as "the tools of despotism and corruption." R. Postgate, *That Devil Wilkes* 53 (1929). Wilkes and others who were involved with the publication in which the attack appeared were arrested.⁵³ Prior to Wilkes' trial, the House of Commons expelled him for publishing "a false, scandalous, and seditious libel." 15 *Parl. Hist. Eng.* 1393 (1764). Wilkes then fled to France and was subsequently sentenced to exile. 9 L. Gipson, *The British Empire Before the American Revolution* 37 (1956).

Wilkes returned to England in 1768, the same year in which the Parliament from which he had been expelled was dissolved. He was elected to the next Parliament, and he then surrendered himself to the Court of King's Bench. Wilkes was convicted of seditious libel and sentenced to 22 months' imprisonment. The new Parlia-

⁵³ Pursuant to a general warrant, Wilkes was arrested, his home ransacked, and his private papers seized. In his later election campaigns, Wilkes denounced the use of general warrants, asserting that he was fighting for liberty itself. See 11 L. Gipson, *The British Empire Before the American Revolution* 213-214 (1965).

the proceedings manifest the Framers' unequivocal intention to deny either branch of Congress the authority to add to or otherwise vary the membership qualifications expressly set forth in the Constitution. We do not completely agree, for the debates are subject to other interpretations. However, we have concluded that the records of the debates, viewed in the context of the bitter struggle for the right to freely choose representatives which had recently concluded in England and in light of the distinction the Framers made between the power to expel and the power to exclude, indicate that petitioners' ultimate conclusion is correct.

The Convention opened in late May 1787. By the end of July, the delegates adopted, with a minimum of debate, age requirements for membership in both the Senate and the House. The Convention then appointed a Committee of Detail to draft a constitution incorporating these and other resolutions adopted during the preceding months. Two days after the Committee was appointed, George Mason, of Virginia, moved that the Committee consider a clause "requiring certain qualifications of landed property & citizenship" and disqualifying from membership in Congress persons who had unsettled accounts or who were indebted to the United States. 2 The Records of the Federal Convention of 1787, at 121 (M. Farrand rev. ed. 1966) (hereinafter cited as Farrand). A vigorous debate ensued. Charles Pinckney and General Charles C. Pinckney, both of South Carolina, moved to extend these incapacities to both the judicial and executive branches of the new government. But John Dickinson, of Delaware, opposed the inclusion of any statement of qualifications in the Constitution. He argued that it would be "impossible to make a compleat one, and a partial one would by implication tie up the hands of the Legislature from

supplying the omissions." *Id.*, at 123.⁶² Dickinson's argument was rejected; and, after eliminating the disqualification of debtors and the limitation to "landed" property, the Convention adopted Mason's proposal to instruct the Committee of Detail to draft a property qualification. *Id.*, at 116-117.

The Committee reported in early August, proposing no change in the age requirement; however, it did recommend adding citizenship and residency requirements for membership. After first debating what the precise requirements should be, on August 8, 1787, the delegates unanimously adopted the three qualifications embodied in Art. I, § 2. *Id.*, at 213.⁶³

On August 10, the Convention considered the Committee of Detail's proposal that the "Legislature of the United States, shall have the authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." *Id.*, at 179. The debate on this proposal discloses much about the views of the Framers on the issue of qualifications. For example, James Madison urged its rejection, stating that the proposal would vest "an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to

⁶² Dickinson also said that a built-in veneration for wealth would be inconsistent with the republican ideal that merit alone should determine who holds the public trust. 2 The Records of the Federal Constitution of 1787, at 123 (M. Farrand rev. ed. 1966) (hereinafter cited as Farrand).

⁶³ On August 10, a delegate moved to reconsider the citizenship qualification. The delegate proposed to substitute a three-year requirement for the seven-year requirement already agreed upon. The motion passed. *Id.*, at 251. However, when this proposal was considered on August 13, it was rejected. *Id.*, at 265-266.

ment declared him ineligible for membership and ordered that he be "expelled this House." 16 Parl. Hist. Eng. 545 (1769). Although Wilkes was re-elected to fill the vacant seat three times, each time the same Parliament declared him ineligible and refused to seat him. See 11 L. Gipson, *supra*, at 207-215.⁵⁴

Wilkes was released from prison in 1770 and was again elected to Parliament in 1774. For the next several years, he unsuccessfully campaigned to have the resolutions expelling him and declaring him incapable of re-election expunged from the record. Finally, in 1782, the House of Commons voted to expunge them, resolving that the prior House actions were "subversive of the Rights of the Whole Body of Electors of this Kingdom." 22 Parl. Hist. Eng. 1411 (1782).

With the successful resolution of Wilkes' long and bitter struggle for the right of the British electorate to be represented by men of their own choice, it is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that "the law of the land had regulated the qualifications of members to serve in parliament" and those qualifications were "not occasional but fixed." 16 Parl. Hist. Eng. 589, 590 (1769). Certainly English practice did not support, nor had it ever supported, respondents' assertion that the power to judge qualifications was generally understood to encompass the right to exclude members-elect for general misconduct not within standing qualifications. With the repudiation in 1782 of the only two precedents

⁵⁴ The issue before the Commons was clear: could the Commons "put in any disqualification, that is not put in by the law of the land." 1 Cavendish's Debates 384 (ed. J. Wright 1841). The affirmative answer was somewhat less than resounding. After Wilkes' third reelection, the motion to seat his opponent carried 197 to 143.

for excluding a member-elect who had been previously expelled,⁵⁵ it appears that the House of Commons also repudiated any "control over the eligibility of candidates, except in the administration of the laws which define their [standing] qualifications." May's Parliamentary Practice 66 (13th ed. Webster 1924). See Taswell-Langmead's, *supra*, at 585.⁵⁶

The resolution of the Wilkes case similarly undermined the precedential value of the earlier colonial exclusions, for the principles upon which they had been based were repudiated by the very body the colonial assemblies sought to imitate and whose precedents they generally followed. See M. Clarke, *supra*, at 54, 59-60, 196. Thus, in 1784 the Council of Censors of the Pennsylvania Assembly⁵⁷ denounced the prior expulsion of an unnamed assemblyman, ruling that his expulsion had not been effected in conformity with the recently enacted Pennsylvania Constitution.⁵⁸ In the course of its report, the

⁵⁵ The validity of the House's action against Wilkes rested to a large extent on the validity of the Walpole precedent. Taswell-Langmead's, *supra*, at 585. Thus, the House of Commons resolution expunging, as subversive to the rights of the whole electorate, the action taken against Wilkes was also a tacit repudiation of the of the similar action taken against Walpole in 1712.

⁵⁶ English law is apparently the same today. See May's Parliamentary Practice 105-108 (17th ed. B. Cocks 1964).

⁵⁷ The Council of Censors was established by the 1776 Pennsylvania Constitution. It was an elected body that was specifically charged with the duty "to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are entitled to by the constitution." Pa. Const. of 1776, § 47, 5 Thorpe 3091. See Introduction to Pennsylvania Convention Proceedings: 1776-1790, at iv (1825).

⁵⁸ In discussing the case, respondents characterize the earlier action as an exclusion. The Council of Censors, however, stated that the

Council denounced by name the Parliamentary exclusions of both Walpole and Wilkes, stating that they "reflected dishonor on none but the authors of these violences." *Pennsylvania Convention Proceedings: 1776-1790*, at 89 (1825).

Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. His advocacy of libertarian causes⁵⁹ and his pursuit of the right to be

general assembly had resolved that the member "is expelled from his seat." *Pennsylvania Convention Proceedings*, *supra*, at 89. The account of the dissenting committee members suggests that the term expulsion was properly used. They note that in February 1783 the assembly received a letter from the Comptroller General charging the assemblyman with fraud. Not until September 9, 1783, did the assembly vote to expel him. Presumably, he held his seat until that time. But, even if he had been excluded, arguably he was excluded for not meeting a standing incapacity, since the Pennsylvania Constitution of 1776 required assemblymen to be "most noted for wisdom and virtue." Pa. Const. of 1776, §7, 5 Thorpe 3084. (Emphasis added.) In fact, the dissenting members of the Committee argued that the expelled member was ineligible under this very provision. *Pennsylvania Convention Proceedings*, *supra*, at 89.

Respondents cite one other exclusion during the period between the Declaration of Independence and the Constitutional Convention 11 years later. In 1780 the Virginia Assembly excluded John Breckenridge because he was a minor. Minority, of course, was a traditional standing incapacity, and Professor Warren therefore appears to have been correct in concluding that this exclusion was probably based upon an interpretation of the state constitutional requirement that members must be duly qualified according to law. Va. Const., 7 Thorpe 3816. See C. Warren, *The Making of the Constitution* 423, n. 1 (1928). Respondents, based upon their misinterpretation of the Pennsylvania case just discussed, criticize Professor Warren for concluding that there had been only one exclusion during this period. Our research, however, has disclosed no other cases.

⁵⁹ Wilkes had established a reputation both in England and the Colonies as a champion of free elections, freedom from arbitrary arrest and seizure, and freedom of the press. See 11 L. Gipson, *supra*, at 191-222.

seated in Parliament became a *cause celebre* for the colonists. "[T]he cry of 'Wilkes and Liberty' echoed loudly across the Atlantic Ocean as wide publicity was given to every step of Wilkes's public career in the colonial press. . . . The reaction in America took on significant proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty. . . . They named towns, counties, and even children in his honour." 11 L. Gipson, *supra*, at 222.⁶⁰ It is within this historical context that we must examine the Convention debates in 1787, just five years after Wilkes' final victory.

b. Convention Debates.

Relying heavily on Professor Charles Warren's analysis⁶¹ of the Convention debates, petitioners argue that

⁶⁰ See R. Postgate, *That Devil Wilkes* 171-172, 173-174 (1929). During the House of Commons debates in 1781, a member remarked that expelling Wilkes had been "one of the great causes which had separated . . . [England] from America." 22 Parl. Hist. Eng. 100-101 (1781).

The writings of the pamphleteer "Junius" were widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause. See 3 Dictionary of American History 190 (1940). Letter XVIII of the "Letters of Junius" bitterly attacked the exclusion of Wilkes. This letter, addressed to Blackstone, asserted:

"You cannot but know, sir, that what was Mr. Wilkes's case yesterday may be yours or mine to-morrow, and that, consequently the common right of every subject of the realm is invaded by it If the expulsion of a member, not under any legal disability, of itself creates in him an incapacity to be elected, I see a ready way marked out, by which the majority may, at any time, remove the honestest and ablest men who happen to be in opposition to them. To say that they will not make extravagant use of their power would be language unfit for a man so learned in the laws as you are. By your doctrine, sir, they have the power: and laws, you know, are intended to guard against what men may do, not to trust what they will do." 2 Letters of Junius, Letter XVIII, at 118 (1821).

⁶¹ See C. Warren, *supra*, at 399-426.

be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect. . . . It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of a [weaker] faction." *Id.*, at 249-250.⁶⁴

Significantly, Madison's argument was not aimed at the imposition of a property qualification as such, but rather at the delegation to the Congress of the discretionary power to establish any qualifications. The parallel between Madison's arguments and those made in Wilkes' behalf is striking.⁶⁵

⁶⁴ Charles Pinckney proposed that the President, judges, and legislators of the United States be required to swear that they possessed a specified amount of unincumbered property. Benjamin Franklin expressed his strong opposition, observing that "[s]ome of the greatest rogues he was ever acquainted with, were the richest rogues." *Id.*, at 249. He voiced the fear that a property requirement would "discourage the common people from removing to this Country." *Ibid.* Thereafter, "the Motion of Mr. Pinkney [*sic*] was rejected by so general a *no*, that the States were not called." *Ibid.* (Emphasis in original.)

⁶⁵ "That the right of electors to be represented by men of their own choice, was so essential for the preservation of all of their other rights, that it ought to be considered as one of the most sacred parts of our constitution That the law of the land had regulated the qualification of members to serve in parliament and that the free holders . . . had an indisputable right to return whom they thought proper, provided he was not disqualified by any of those known laws They are not occasional but fixed: to rule and govern the question as it shall arise; not to start up on a sudden, and shift from side to side, as the caprice of the day or the fluctuation of party shall direct." 16 Parl. Hist. Eng. 589-590 (1769).

In view of what followed Madison's speech, it appears that on this critical day the Framers were facing and then rejecting the possibility that the legislature would have power to usurp the "indisputable right of the people to return whom they thought proper"⁶⁶ to the legislature. Oliver Ellsworth, of Connecticut, noted that a legislative power to establish property qualifications was exceptional and "dangerous because it would be much more liable to abuse." *Id.*, at 250. Gouverneur Morris then moved to strike "with regard to property" from the Committee's proposal. His intention was "to leave the Legislature entirely at large." *Ibid.* Hugh Williamson, of North Carolina, expressed concern that if a majority of the legislature should happen to be "composed of any particular description of men, of lawyers for example, . . . the future elections might be secured to their own body." *Ibid.*⁶⁷ Mr. Madison then referred to the British Parliament's assumption of the power to regulate the qualifications of both electors and the elected and noted that "the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties." *Ibid.*⁶⁸ Shortly thereafter,

⁶⁶ *Id.*, at 589.

⁶⁷ Wilkes had made essentially the same argument in one of his early attempts to have the resolutions denying him a seat expunged:

"This usurpation, if acquiesced under, would be attended with the most alarming consequences. If you can reject those disagreeable to a majority, and expel whom you please, the House of Commons will be self-created and self-existing. You may expel till you approve, and thus in effect you nominate. The original idea of this House being the representative of the Commons of the realm will be lost." 18 Parl. Hist. Eng. 367 (1775).

⁶⁸ Professor Warren concluded that "Madison's reference was undoubtedly to the famous election case of John Wilkes" C. Warren, *supra*, at 420, n. 1. It is also possible, however, that he was referring to the Parliamentary Test Act, 30 Car. II st. 2,

the Convention rejected both Governor Morris' motion and the Committee's proposal. Later the same day, the Convention adopted without debate the provision authorizing each House "to be the judge of the . . . qualifications of its own members." *Id.*, at 254.

One other decision made the same day is very important to determining the meaning of Art. I, § 5. When the delegates reached the Committee of Detail's proposal to empower each House to expel its members, Madison "observed that the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies one faction might be dangerously abused." *Id.*, at 254. He therefore moved that "with the concurrence of two-thirds" be inserted. With the exception of one State, whose delegation was divided, the motion was unanimously approved without debate, although Gouverneur Morris noted his opposition. The importance of this decision cannot be over-emphasized. None of the parties to this suit disputes that prior to 1787 the legislative powers to judge qualifications and to expel were exercised by a majority vote. Indeed, without exception, the English and colonial antecedents to Art. I, § 5, cl. 1 and 2, support this conclusion. Thus, the Convention's decision to increase the vote required to expel, because that power was "too important to be exercised by a bare majority," while at the same time not similarly restricting the power to judge qualifications, is compelling evidence that they considered the latter already limited by the standing qualifications previously adopted.⁶⁹

c. 1 (1678), which had excluded Catholics as a group from serving in Parliament.

⁶⁹ Professor Charles Warren, upon whose interpretation of these events petitioners rely, concluded that the Convention's decision to reject Gouverneur Morris' proposal and the more limited proposal of the Committee of Detail was an implicit adoption of Madison's

Respondents urge, however, that these events must be considered in light of what they regard as a very significant change made in Art. I, § 2, cl. 2, by the Committee of Style. When the Committee of Detail reported the provision to the Convention, it read:

"Every member of the House of Representatives shall be of the age of twenty-five years; shall have been a citizen of [in] the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen." *Id.*, at 178.

However, as finally drafted by the Committee of Style, these qualifications were stated in their present negative form. Respondents note that there are no records of the "deliberations" of the Committee of Style. Nevertheless, they speculate that this particular change was designed to make the provision correspond to the form used by Blackstone in listing the "standing incapacities" for membership in the House of Commons. See 1 Blackstone's Commentaries *175-176. Blackstone, who was an apologist for the anti-Wilkes forces in Parlia-

position that the qualifications of the elected "were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution." 2 Farrand 249-250. See C. Warren, *supra*, at 420-421. Certainly, Warren argued, "[s]uch action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress . . . the right to establish any qualifications for its members other than those qualifications established by the Constitution itself . . . For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress." *Id.*, at 421. See 1 J. Story, Commentaries on the Constitution of the United States § 625, at 445 (1873). Although Professor Chafee argued that congressional precedents do not support this construction, he nevertheless stated that forbidding any additions to the qualifications expressed in the Constitution was "the soundest policy." Z. Chafee, Free Speech in the United States 256 (1941).

ment,⁷⁰ had added to his Commentaries after Wilkes' exclusion the assertion that individuals who were not ineligible for the Commons under the standing incapacities could still be denied their seat if the Commons deemed them unfit for other reasons.⁷¹ Since Blackstone's Commentaries were widely circulated in the Colonies, respondents further speculate that the Committee of Style rephrased the qualifications provision in the negative to clarify the delegates' intention "only to prescribe the standing incapacities without imposing any other limit on the historic power of each house to judge qualifications on a case by case basis."⁷²

Respondents' argument is inherently weak, however, because it assumes that legislative bodies historically possessed the power to judge qualifications on a case-by-case basis. As noted above, the basis for that conclusion was the Walpole and Wilkes cases, which, by the time of the Convention, had been denounced by the House of Commons and repudiated by at least one State government. Moreover, respondents' argument misrepresents the function of the Committee of Style. It was appointed only "to revise the style of and arrange the articles which had been agreed to" 2 Farrand 553.

⁷⁰ See 10 W. Holdsworth, A History of English Law 540-542 (1938).

⁷¹ Holdsworth notes that in the first edition of Blackstone's Commentaries Blackstone enumerated various incapacities and then concluded that "subject to these standing restrictions and disqualifications, every subject of the realm is eligible [for membership in the House of Commons] of common right." 1 Blackstone's Commentaries *176. Blackstone was called upon in Commons to defend Wilkes' exclusion and the passage was quoted against him. Blackstone retaliated by writing a pamphlet and making two additions to later editions of his *Commentaries* in an effort to justify the decision of Parliament. W. Holdsworth, *supra*, at 540-541.

⁷² Appendix D to Brief for Respondents, at 52.

"The Committee . . . had no authority from the Convention to make alterations of substance in the Constitutions voted by the Convention, nor did it purport to do so; and certainly the Convention had no belief . . . that any important change was, in fact, made in the provisions as to qualifications adopted by it on August 10."⁷³

* Petitioners also argue that the post-Convention debates over the Constitution's ratification support their interpretation of § 5. For example, they emphasize Hamilton's reply to the antifederalist charge that the new Constitution favored the wealthy and well-born:

"The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, the *manner* of elections. *The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.*" The Federalist 371 (Mentor ed.). (Emphasis added in part.)

⁷³ C. Warren, *supra*, at 422, n. 1. Professor Warren buttressed his conclusion by noting that the Massachusetts Constitution of 1780 "contained affirmative qualifications for Representatives and exactly similar negative qualifications for Senators." *Ibid.* Apparently, these provisions were not considered substantively different, for each house was empowered in identical language to "judge of the elections, returns, and qualifications of their own members, as pointed out in the constitution." Mass. Const., Pt. 2, c. I, § 2, Art. IV, 3 Thorpe 1897, and § 3, Art. X, 3 Thorpe 1899. (Emphasis added.) See C. Warren, *supra*, at 422-423, n. 1.

Madison had expressed similar views in an earlier essay,⁷⁴ and his arguments at the Convention leave no doubt about his agreement with Hamilton on this issue.

Respondents counter that Hamilton was actually addressing himself to criticism of Art. I, § 4, which authorizes Congress to regulate the times, places, and manner of electing members of Congress. They note that prominent antifederalists had argued that this power could be used to "confer on the rich and *well-born* all honours." Brutus No. IV, N. Y. Journal, Nov. 29, 1787, p. 7. (Emphasis in original.) Respondents' contention, however, ignores Hamilton's express reliance on the immutability of the qualifications set forth in the Constitution.⁷⁵

The debates at the state conventions also demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution. Before the New York convention, for example, Hamilton emphasized: "[T]he true principle of a republic is, that

⁷⁴ In No. 52 of The Federalist, Madison stated:

"The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention. [He then enumerated the qualifications for both representatives and Senators.] . . . Under these reasonable limitations, the door of this part of the federal government is open to men of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith." The Federalist 326 (Mentor ed. 1961).

⁷⁵ Respondents dismiss Madison's assertion that the "qualifications of the elected, . . . being at the same time more susceptible of uniformity, have been very properly considered and regulated by the convention," as nothing more than a refutation of the charge that the new national legislature would be free to establish additional "standing incapacities." However, this conclusion cannot be reconciled with the pre-Convention history on this question, the Convention debates themselves, and, in particular, the delegates' decision to require a two-thirds vote for expulsion.

the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed." 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876) (hereinafter cited as Elliot's Debates).⁷⁶ In Virginia, where the Federalists faced powerful opposition by advocates of popular democracy, Wilson Carey Nicholas, a future member of both the House and Senate and later Governor of the State, met the arguments that the new Constitution violated democratic principles with the following interpretation of Art. I, § 2, cl. 2: "[A]s it respects the qualifications of the elected. It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended this idea. We find no qualifications required except those of age and residence which create a certainty of their judgment being matured, and of being attached to their state." 3 Elliot's Debates 8.

c. Post-Ratification.

As clear as these statements appear, respondents dismiss them as "general statements . . . directed to other issues."⁷⁷ They suggest that far more relevant is Congress' own understanding of its power to judge qualifications as manifested in post-ratification exclusion cases. Unquestionably, both the House and the Senate have excluded members-elect for reasons other than their

⁷⁶ At the same convention, Robert Livingston, one of the new Constitution's most ardent supporters and one of the State's most substantial landowners, endorsed this same fundamental principle: "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." 2 Elliot's Debates 292-293.

⁷⁷ Appendix D to Brief for Respondents, at 62.

failure to meet the Constitution's standing qualifications. For almost the first 100 years of its existence, however, Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution.

Congress was first confronted with the issue in 1807,⁷⁸ when the eligibility of William McCreery was challenged because he did not meet additional residency requirements imposed by the State of Maryland. In recommending that he be seated, the House Election Committee reasoned:

"The Committee proceeded to examine the Constitution with relation to the case submitted to them, and find that qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications; and that, by that instrument, Congress is constituted the sole judge of the qualifications prescribed by it, and are obliged to decide agreeably to the Constitutional rules" 17 *Annals of Cong.* 871 (1807).

Lest there be any misunderstanding of the basis for the committee's recommendation, during the ensuing debate the chairman explained the principles by which the committee was governed:

"The Committee of Elections considered the qualifications of members to have been unalterably de-

⁷⁸ In 1799, during the 5th Congress, 1st Session, the House considered expelling Matthew Lyon, a Republican, for sedition. The vote to expel, however, was 49 to 45, and broke down largely along partisan lines. Although Lyon's opponents, the Federalists, retained a majority in the 6th Congress, to which Lyon was reelected, and although there were political advantages to be gained from again trying to prevent him from taking his seat, there was no effort made to exclude him. See P. Dionisopoulos, *A Commentary on the Constitutional Issue in the Powell and Related Cases*, 17 J. Pub. L. 107, 123-127 (1968).

terminated by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them Congress, by the Federal Constitution, are not authorized to prescribe the qualifications of their own members, but they are authorized to judge of their qualifications; in doing so, however, they must be governed by the rules prescribed by the Federal Constitution, and by them only. These are the principles on which the Election Committee have made up their report and upon which their resolution is founded." *Id.*, at 872.

The chairman emphasized that the committee's narrow construction of the power of the House to judge qualifications was compelled by the "fundamental principle in a free government," *id.*, at 873, that restrictions upon the people to choose their own representatives must be limited to those "absolutely necessary for the safety of the society." *Id.*, at 874. At the conclusion of a lengthy debate, which tended to center on the more narrow issue of the power of the States to add to the standing qualifications set forth in the Constitution, the House agreed by a vote of 89 to 18 to seat Congressman McCreery. *Id.*, at 1237. See 1 A. Hinds, *Precedents of the House of Representatives* § 414 (1907) (hereinafter cited as Hinds).

There was no significant challenge to these principles for the next several decades.⁷⁹ They came under heavy

⁷⁹ Another Maryland representative was unsuccessfully challenged in 1808 on grounds almost identical to those asserted in the challenge of McCreery. See 18 *Annals of Cong.* 1848-1849 (1808). In 1844, the Senate declined to exclude John M. Niles, who was accused of being mentally incompetent, after a special committee reported him competent. *Cong. Globe*, 28th Cong., 1st Sess., 564-565, 602 (1844). In 1856, the House rejected an attempt to exclude Samuel

attack, however, "during the stress of civil war [but initially] the House of Representatives declined to exercise the power [to exclude], even under circumstances of great provocation."⁸⁰ Rules of the House of Representatives, H. R. Doc. No. 529, 89th Cong., 2d Sess., § 12, at 7 (1967). The abandonment of such restraint, however, was among the casualties of the general upheaval produced in war's wake. In 1868, the House voted for the first time in its history to exclude a member-elect. It refused to seat two duly elected representatives for giving aid and comfort to the Confederacy. See 1 Hinds §§ 449-451.⁸¹ "This change was produced by the North's bitter enmity toward those who failed to support the Union cause during the war, and was effected by the Radical Republican domination of Congress. It was a shift brought by the naked urgency of power and was given little doctrinal support." Comment, Legislative Exclusion: Julian Bond and Adam Clayton Powell, 35 U. Chi. L. Rev. 151, 157 (1967).⁸² From that time until

Marshall for violating an Illinois law prohibiting state judges from running for other offices. 1 A. Hinds, Precedents of the House of Representatives § 415 (1907) (hereinafter cited as Hinds). That same year, the Senate refused to exclude Lyman Trumbull for violating the same Illinois law. *Ibid.*

⁸⁰ Between 1862 and 1867, both the House and Senate resisted several attempts to exclude members-elect who were accused of being disloyal to the Union during the Civil War. See, *id.*, §§ 448, 455, 458; Senate Subcommittee on Privileges and Elections, Senate Committee on Rules and Administration, Senate Election, Expulsion and Censure Cases, S. Doc. No. 71, 87th Cong., 2d Sess., 21 (1962) (hereinafter cited as Senate Cases).

⁸¹ That same year the Senate also excluded a supporter of the Confederacy. Senate Cases 40. The House excluded two others shortly thereafter, one for the same offense, and another for selling appointments to the Military and Naval Academies. See 1 Hinds §§ 459, 464; 2 Hinds § 1273.

⁸² This departure from previous House construction of its power to exclude was emphasized by Congressman William P. Feddenden: "[T]he power which we have under the Constitution to judge the

the present, congressional practice has been erratic;⁸³ and on the few occasions when a member-elect was excluded although he met all the qualifications set forth in the

qualifications of members of the body is not a mere arbitrary power, to be exerted according to the will of the individuals who may vote upon the subject. It ought to be a power subject to certain rules and founded upon certain principles. So it was up to a very later period, until the rebellion. The rule simply was, if a man came here and presented proper credentials from his State, to allow him to take the ordinary oath, which we all took, to support the Constitution, and be admitted, and if there was any objection to him to try that question afterward." Cong. Globe, 40th Cong., 2d Sess., 685 (1868).

⁸³ For example, in 1870, the House refused to exclude a Texas Congressman accused of a variety of criminal acts, 1 Hinds § 465; but in 1882 and again in 1900 the House excluded a member-elect for practicing polygamy. 1 Hinds §§ 473, 477-480. Thereafter, it apparently did not consider excluding anyone until shortly after World War I, when it twice excluded Victor L. Berger, an avowed Socialist, for giving aid and comfort to the enemy. Significantly, the House committee investigating Berger concluded that he was ineligible under the express provision of § 3 of the Fourteenth Amendment. 6 C. Cannon, Precedents of the House of Representatives §§ 56-59 (1935) (hereinafter cited as Cannon). Berger, the last person to be excluded from the House prior to Powell, was later reelected and finally admitted after his criminal conviction was reversed. 65 Cong. Rec. 7 (1923).

The House next considered the problem in 1925 when it contemplated excluding John W. Langley for his alleged misconduct. Langley resigned after losing a criminal appeal, and the House therefore never voted upon the question. 6 Cannon § 238. The most recent exclusion attempt prior to Powell's occurred in 1933, when the House refused to exclude a Representative from Minnesota who had been convicted of sending defamatory matter through the mail. See 77 Cong. Rec. 73-74, 131-139 (1933).

The Senate has not excluded anyone since 1929; in that year it refused to seat a member-elect because of improper campaign expenditures. 6 Cannon § 180. In 1947, a concerted effort was made to exclude Senator Theodore C. Bilbo of Mississippi for allegedly accepting gifts from war contractors and illegally intimidating Negroes in Democratic primaries. See 93 Cong. Rec. 3-28 (1947). He died, however, before a decision was reached.

Constitution, there were frequently vigorous dissents.⁸⁴ Even the annotations to the official manual of procedure for the 90th Congress manifests doubt as to the House's power to exclude a member-elect who has met the constitutionally prescribed qualifications. See Rules of the House of Representatives, H. R. Doc. No. 529, 89th Cong., 2d Sess., § 12, at 7-8 (1967).

Had these congressional exclusion precedents been more consistent, their precedential value still would be quite limited. See Note, the Power of a House of Congress to Judge the Qualifications of its Members, 81 Harv. L. Rev. 673, 679 (1968).⁸⁵ That an unconstitu-

⁸⁴ During the debates over H. R. Res. No. 278, Congressman Celler, chairman of both the Select Committee and the Judiciary Committee, forcefully insisted that the Constitution "unalterably fixed and defined" the qualifications for membership in the House and that any other construction of Art. I, § 5, would be "improper and dangerous." 113 Cong. Rec. 1920 (daily ed. March 1, 1967). See H. R. Rep. No. 484, 43d Cong., 1st Sess., 11-15 (1874) (views of minority); H. R. Rep. No. 85, 56th Cong., 1st Sess., 53-77 (1900) (views of minority). In the latter report, the dissenters argued: "A small partisan majority might render the desire to arbitrarily exclude, by a majority vote, in order to more securely intrench itself in power, irresistible. Hence its exercise is controlled by legal rules. In case of expulsion, when the requisite two-thirds can be had, the motive for the exercise of arbitrary power no longer exists, as a two-thirds partisan majority is sufficient for every purpose The power of exclusion is a matter of law, to be exercised by a majority vote, in accordance with legal principles, and exists only where a member-elect lacks some of the qualifications required by the Constitution." *Id.*, at 76-77.

⁸⁵ "Determining the basis for congressional action is itself difficult since a congressional action, unlike a reported judicial decision, contains no statement of the reasons for the disposition, one must fall back on the debates and the committee reports. If more than one issue is raised in the debates, one can never be sure on what basis the action was predicated. Unlike a court, which is presumed to be disinterested, in an exclusion case the concerned house is in effect a party to the controversy that it must adjudicate. Consequently,

tional action has been taken before surely does not render that same action any less unconstitutional at a later date. Particularly in view of the Congress' own doubts in those few cases where it did exclude members-elect, we are not inclined to give its precedents controlling weight. The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787. See *Myers v. United States*, 272 U. S. 52, 175 (1926). And, what evidence we have of Congress' early understanding confirms our conclusion that the House is without power to exclude any member-elect who meets the Constitution's requirements for membership.

d. Conclusion.

Had the intent of the Framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning, borne out in the Wilkes case and some of Con-

some members may be inclined to vote for exclusion though they strongly doubt its constitutionality." 81 Harv. L. Rev., at 679.

gress' own post-Civil War exclusion cases, against "vesting an improper & dangerous power in the Legislature." 2 Farrand 249. Moreover, it would effectively nullify the Convention's decision to require a two-third vote for expulsion. Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds. In short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote.

For these reasons, we have concluded that Art. I, § 5, is at most a "textually demonstrable commitment" to Congress to judge only the qualifications expressly set forth in the Constitution. Therefore, the "textual commitment" formulation of the political question doctrine does not bar federal courts from adjudicating petitioners' claims.

2. Other Considerations.

Respondents' alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a "potentially embarrassing confrontation between coordinate branches" of the Federal Government. But, as our interpretation of Art. I, § 5, discloses, a determination of Petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of respect due [a] coordinate branch of government," nor does it involve an "initial policy determination of a kind clearly for non-

judicial discretion." *Baker v. Carr, supra*, at 217. Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict⁸⁶ that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. See *United States v. Brown*, 381 U. S. 437, 462 (1965); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U. S. 579, 613-614 (1952) (Frankfurter, J., concurring); *Myers v. United States*, 272 U. S. 52, 293 (1926) (Brandeis, J., dissenting).

Nor are any of the other formulations of a political question "inextricable from the case at bar." *Baker v. Carr, supra*, at 217. Petitioners seek a determination that the House was without power to exclude Powell from the 90th Congress, which, we have seen, requires an interpretation of the Constitution—a determination for which clearly there are "judicially manageable standards." Finally, a judicial resolution of petitioners' claim will not result in "multifarious pronouncements by various departments on one question." For, as we noted in *Baker v. Carr, supra*, at 211, it is the responsibility of this Court to act as the ultimate interpreter of the Constitution. *Marbury v. Madison*, 1 Cranch 137 (1803). Thus, we conclude that petitioners' claim is not barred by the political question doctrine, and having determined that the claim is otherwise generally justiciable, we hold that the case is justiciable.

VII.

CONCLUSION.

To summarize, we have determined the following:
(1) This case has not been mooted by Powell's seating in

⁸⁶ In fact, the Court has noted that it is an "inadmissible suggestion" that action might be taken in disregard of a judicial determination. *McPherson v. Blacker*, 146 U. S. 1, 24 (1892).

the 91st Congress. (2) Although this action should be dismissed against respondent Congressmen, it may be sustained against their agents. (3) The 90th Congress' denial of membership to Powell cannot be treated as an expulsion. (4) We have jurisdiction over the subject matter of this controversy. (5) The case is justiciable.

Further, analysis of the "textual commitment" under Art. I, § 5 (see Part VI, Section B (1)), has demonstrated that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution. Respondents concede that Powell met these. Thus, there is no need to remand this case to determine whether he was entitled to be seated in the 90th Congress. Therefore, we hold that that, since Adam Clayton Powell, Jr., was duly elected by the voters of the 18th Congressional District of New York and was not ineligible to serve under any provision of the Constitution, the House was without power to exclude him from its membership.

Petitioners seek additional forms of equitable relief, including mandamus for the release of Petitioner Powell's back pay. The propriety of such remedies, however, is more appropriately considered in the first instance by the courts below. Therefore, as to Respondents McCormack, Albert, Ford, Celler, and Moore, the judgment of the Court of Appeals for the District of Columbia Circuit is affirmed. As to Respondents Jennings, Johnson, and Miller, the judgment of the Court of Appeals for the District of Columbia Circuit is reversed and the case is remanded to the United States District Court for the District of Columbia with instructions to enter a declaratory judgment and for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 138.—OCTOBER TERM, 1968.

Adam Clayton Powell, Jr.,	} On Writ of Certiorari to
et al., Petitioners,	
v.	
John W. McCormack et al.	} the United States Court of Appeals for the Dis- trict of Columbia Circuit.

[June 16, 1969.]

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, I add a few words. As the Court¹ says, the important constitutional question is whether the Congress has the power to deviate from or alter the qualifications for membership as a Representative contained in Art. I, § 2, cl. 2, of the Constitution.¹ Up to now the understanding has been quite clear to the effect that such authority does not exist.² To be sure, Art. I, § 5, provides that "Each

¹ U. S. Const., Art. I, § 2, cl. 2.

"No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

² The Constitutional Convention had the occasion to consider several proposals for giving Congress discretion to shape its own qualifications for office and explicitly rejected them. James Madison led the opposition by arguing that such discretion would be "an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Gov't and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution." 2 Farrand, Records of the Federal Convention of 1787 249-251 (1911).

Alexander Hamilton echoed that same conclusion:

"the qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed

House shall be the judge of the Elections, Returns and Qualifications of its own Members” Contests may arise over whether an elected official meets the “qualifications” of the Constitution, in which event the House is the sole judge.³ But the House is not the sole judge when “qualifications” are added which are not specified in the Constitution.⁴

in the Constitution, and are unalterable by the legislature.” The Federalist No. 60, at 371 (1961).

And so, too, the early Congress of 1807 decided to seat Representative-elect William McCreery on the ground that its power to “judge” was limited by the enumerated qualifications.

“The Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first. . . . Congress, by the Federal Constitution, are not authorized to prescribe the qualifications of their own members, but they are authorized to judge of their qualifications; in doing so, however, they must be governed by the rules prescribed by the Federal Constitution, and by them only.” 17 Annals of Congress 871 (1807) (remarks of Rep. Findley, Chairman of House Committee of Elections).

Constitutional scholars of two centuries have reaffirmed the principle that congressional power to “judge” the qualifications of its members is limited to those enumerated in the Constitution. J. Story, Commentaries on the Constitution 462 (5th ed. 1902); C. Warren, The Making of the Constitution 420-426 (1937). See also remarks by Emmanuel Celler, Chairman of the House Select Committee which inquired into the qualifications of Adam Clayton Powell, Jr., and which recommended seating him:

“The Constitution lays down three qualifications for one to enter Congress—age, inhabitancy, citizenship. Mr. Powell satisfies all three. The House cannot add to these qualifications.” 113 Cong. Rec. H1919 (daily ed., March 1, 1967).

³ *Baker v. Carr*, 369 U. S. 186, 242, n. 2 (DOUGLAS, J., concurring).

⁴ The question whether Congress has authority under the Constitution to add to enumerated qualifications for office is itself a federal question within the particular expertise of this Court. *Baker v. Carr*, 369 U. S. 186, 211. Where that authority has been exceeded, redress may be properly sought here. *Marbury v. Madison*, 1 Cranch

A man is not seated because he is a Socialist or a Communist.⁵

Another is not seated because in his district members of a minority are systematically excluded from voting.⁶

Another is not seated because he has spoken out in opposition to the war in Vietnam.⁷

The possible list is long. Some cases will have the racist overtones of the present one.

Others may reflect religious or ideological clashes.⁸

At root, however, is the basic integrity of the electoral process. Today we proclaim the constitutional principle of "one man one vote." When that principle is followed and the electors chose a person who is repulsive to the Establishment in Congress, by what constitutional authority can that group of electors be disenfranchised?

By Art. I, § 5, the House may "expel a member" on a vote of two-thirds. And if this were an expulsion case I would think that no justiciable controversy were presented, the vote of the House being two-thirds or more.

137. Congress itself suspected no less in deciding to exclude Rep. Powell.

"[C]ases may readily be postulated where the action of a House in excluding or expelling a Member may directly impinge upon rights under other provisions of the Constitution. In such cases, the unavailability of judicial review may be less certain. Suppose, for example, that a Member was excluded or expelled because of his religion or race, contrary to the equal protection clause, or for making an unpopular speech protected by the first amendment. . . . Exclusion of a Member-elect on grounds other than age, citizenship, or inhabitancy could raise an equally serious constitutional issue." H. R. Rep. No. 27, 90th Cong., 1st Sess., 30 (1967).

See also 113 Cong. Rec. 1916, 90th Cong., 1st Sess. (1967).

⁵ Case of Victor Berger, 6 C. Cannon, Precedents of the House of Representatives of the United States, § 56 (1935).

⁶ 6 C. Cannon, Precedents of the House of Representatives of the United States, § 122 (1935).

⁷ See, e. g., *Bond v. Floyd*, 385 U. S. 116.

⁸ 1 A. Hinds, Precedents of the House of Representatives of the United States, § 481 (1907).

But it is not an expulsion case. Whether it could have been won as an expulsion case, no one knows. Expulsion for "misconduct" may well raise different questions, different considerations. Policing the conduct of members, a recurring problem in the Senate and House as well, is quite different from the initial decision whether an elected official should be seated. It well might be easier to bar admission than to expel one already seated.

The House excluded Representative-elect Powell from the Ninetieth Congress allegedly for misappropriating public funds and for incurring the contempt of New York courts.⁹ Twenty-six years earlier, members of the upper chamber attempted to exclude Senator-elect William Langer of North Dakota for like reasons.¹⁰ Langer first became State's Attorney for Morton County, North Dakota, from 1914 to 1916, and then served as State Attorney General from 1916 to 1920. He became Governor of the State in 1932 and took office in January 1933. In 1934 he was indicted for conspiring to interfere with the enforcement of federal law by illegally soliciting political contributions from federal employees and suit was filed in the State Supreme Court to remove him from office.¹¹ While that suit was pending, he called the State Legislature into special session.¹² When it became clear that the court would order his ouster, he signed a Declaration of Independence, invoked martial law, and called out the National Guard.¹³ Nonetheless, when his own officers refused to recognize him as the legal head of state, he left office in July 1934. As with Adam

⁹ 113 Cong. Rec. 1918 (daily ed. March 1, 1967).

¹⁰ S. Doc. No. 71 on Senate Election, Expulsion and Censure Cases from 1789 to 1960, 87th Cong., 2d Sess., 140 (1962).

¹¹ Hearings on A Protest to the Seating of William Langer, before the Senate Committee on Privileges and Elections, 77th Cong., 1st Sess., at 820 (Nov. 3, 18, 1941) (hereinafter Hearings).

¹² Hearings, at 821.

¹³ Hearings, at 820.

Clayton Powell, however, the people of the State still wanted him. In 1937, they re-elected him Governor and, in 1940, they sent him to the United States Senate.

During the swearing-in ceremonies, Senator Barkley drew attention to certain complaints filed against Langer by citizens of North Dakota, yet asked that he be allowed to take the oath of office

"without prejudice, which is a two-sided proposition—without prejudice to the Senator, and without prejudice to the Senate in the exercise of its rights [to exclude him]." ¹⁴

The matter of Langer's qualifications to serve in the Senate was referred to committee which held confidential hearings on January 9 and 16, 1941, and open hearings on November 3 and 18, 1941. By a vote of 14 to 2, the committee reported that a majority of the Senate had jurisdiction under Art. I, § 5, cl. 1, of the Constitution to exclude Langer; and by a vote of 13 to 3, it reported its recommendation that Langer not be seated. ¹⁵

The charges against Langer were various. As with Powell, they included claims that he had misappropriated public funds ¹⁶ and that he had interfered with the judicial process in a way that beclouded the dignity of Congress. ¹⁷ Reference was also made to his professional ethics as a lawyer. ¹⁸

¹⁴ 87 Cong. Rec. 1-2 (1941).

¹⁵ S. Rep. No. 1010, 77th Cong., 2d Sess. (1942).

¹⁶ It was alleged that he had conspired as Governor to have municipal and county bonds sold to a friend of his who made a profit of \$300,000 on the purchase, and purportedly rebated as much as \$56,000 to Langer himself. Hearings, at 822-823.

¹⁷ At the retrial of his conviction for conspiring to interfere with the enforcement of federal law, he was said to have paid money to have a friend of his, Judge Wyman, be given control of the litigation, and to have "meddled" with the jury. Hearings, at 20-42, 120-130.

¹⁸ He was charged as a lawyer with having accepted \$2,000 from the mother of a boy in prison on the promise that he would obtain

Langer enjoyed the powerful advocacy of Senator Murdock from Utah. The Senate debate itself raged for over a year.¹⁹ Much of it related to purely factual allegations of "moral turpitude." Some of it, however, was addressed to the power of the Senate under Art. I, § 5, cl. 1, to exclude a member-elect for lacking qualifications not enumerated in Art. I, § 3.

"Mr. MURDOCK. [U]nder the Senator's theory that the Senate has the right to add qualifications which are not specified in the Constitution, does the Senator believe that the Senate could adopt a rule specifying intellectual and moral qualifications?"²⁰

"Mr. LUCAS. The Senate can do anything it wants to do Yes; the Senate can deny a person his seat simply because it does not like the cut of his jaw, if it wishes to."²¹

Senator Murdock argued that the only qualifications for service in the Senate were those enumerated in the Constitution; that Congress had the power to review those enumerated qualifications; but that it could not—while purporting to "judge" those qualifications—in reality add to them.

"Mr. LUCAS. The Senator referred to article I, section 5. What does he think the framers of the

his pardon, when he knew, in fact, that a pardon was out of the question. He was also said to have counseled a defendant-client of his to marry the prosecution's chief witness in order to prevent her from testifying against him. And finally, it was suggested that he once bought an insurance policy during trial from one of the jurors sitting in judgment of his client. Hearings, at 820-830.

¹⁹ 87 Cong. Rec. 3-4, 34, 460 (1941); 88 Cong. Rec. 822, 828, 1253, 2077, 2165, 2239, 2328, 2382, 2412, 2472, 2564, 2630, 2699, 2759, 2791, 2801, 2842, 2858, 2914, 2917, 2959, 2972, 2989, 3038, 3051, 3065, 5668 (1942).

²⁰ 88 Cong. Rec. 2401.

²¹ *Ibid.*

Constitution meant when they gave to each House the power to determine or to judge the qualifications, and so forth, of its own Members?²²

"Mr. MURDOCK. I construe the term 'judge' to mean what it is held to mean in its common, ordinary usage. My understanding of the definition of the word 'judge' as a verb is this: When we judge a thing it is supposed that the rules are laid out; the law is there for us to look at and to apply to the facts.

"But whoever heard the word 'judge' used as meaning the power to add to what is already the law?"²³

It was also suggested from the floor that the enumerated qualifications in § 3 were only a *minimum* which the Senate could supplement; and that the Founding Fathers so intended by using words of the negative. To which Senator Murdock replied—

"Mr. PRESIDENT. I think it is the very distinguished and able Senator from Georgia who makes the contention that the constitutional provisions relating to qualifications, because they are stated in the negative—that is, 'no person shall be a Senator'—are merely restrictions or prohibitions on the State; but—and I shall read it later on—when we read what Madison said, when we read what Hamilton said, when we read what the other framers of the Constitution said on that question, there cannot be a doubt as to what they intended and what they meant."²⁴

²² 88 Cong. Rec. 2474.

²³ *Ibid.*

²⁴ 88 Cong. Rec. 2474.

"Madison knew that the qualifications should be contained in the Constitution and not left to the whim and caprice of the legislature."²⁵

"Bear in mind, that the positive or affirmative phraseology was not changed to the negative by debate or by amendment in the convention, but it was changed by the committee of which Madison was a member, the committee on style."²⁶

The Senate was nonetheless troubled by the suggestion that the Constitution compelled it to accept anyone whom the people might elect, no matter how egregious and even criminal his behavior. No need to worry, said Murdock. It is true that the Senate cannot invoke its majority power to "judge" under Art. I, § 5, cl. 1, as a device for excluding men elected by the people who possess the qualifications enumerated by the Constitution. But it does have the power under Art. I, § 5, cl. 2, to expel anyone it designates by a two-thirds vote. Nonetheless, he urged the Senate not to bypass the two-thirds requirement for expulsion by wrongfully invoking its power to exclude.²⁷

"Mr. LUCAS. The position the Senator from Utah takes is that it does not make any difference what a Senator does in the way of crime, that whenever he is elected by the people of his State, comes here with bona fide credentials, and there is no fraud

²⁵ 88 Cong. Rec. 2483.

²⁶ 88 Cong. Rec. 2484.

²⁷ Although the House excluded Adam Clayton Powell by over two-thirds vote, they were operating on the assumption that only a majority was needed. For the suggestion that the House could never have rallied the votes to exclude Powell on the basis of a two-thirds ground rule, see Note, 14 *How. L. J.* 162 (1968); Comment, 42 *N. Y. U. L. Rev.* 716 (1967).

in the election, the Senate cannot refuse to give him the oath. That is the position the Senator takes?

"Mr. MURDOCK. That is my position; yes."²⁸

"My position is that we do not have the right to exclude anyone who comes here clothed with the proper credentials and possessing the constitutional qualifications. My position is that we do not have the right under the provision of the Constitution, to which the Senator from Florida referred, to add to the qualifications. My position is that the State is the sole judge of the intellectual and the moral qualifications of the representatives it sends to Congress."²⁹

"MR. MURDOCK [quoting Senator Philander Knox]. 'I know of no defect in the plain rule of the Constitution for which I am contending. . . . I cannot see that any danger to the Senate lies in the fact than an improper character cannot be excluded without a two-thirds vote. It requires the unanimous vote of a jury to convict a man accused of a crime; it should require, and I believe that it does require, a two thirds vote to eject a Senator from his position of honor and power, to which he has been elected by a sovereign State.'"³⁰

Thus, after a year of debate, on March 27, 1942, the Senate overruled the recommendation of its committee and voted 52 to 30 to seat Langer.

I believe that Senator Murdock stated the correct constitutional principle governing the present case.

²⁸ 88 Cong. Rec. 2488.

²⁹ 88 Cong. Rec. 2490.

³⁰ 88 Cong. Rec. 2488. Senator Knox of Pennsylvania had defended Senator-elect Reed Smoot of Utah in 1903 against charges that he ought to be excluded because of his affiliation with a group (Mormons) that countenanced polygamy. S. Doc. No. 71, 87th Cong., 2d Sess., at 97.

SUPREME COURT OF THE UNITED STATES

No. 138.—OCTOBER TERM, 1968.

Adam Clayton Powell, Jr., et al., Petitioners, v. John W. McCormack et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Dis- trict of Columbia Circuit.
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[June 16, 1969.]

MR. JUSTICE STEWART, dissenting.

I believe that events which have taken place since certiorari was granted in this case on November 18, 1968, have rendered it moot, and that the Court should therefore refrain from deciding the novel, difficult, and delicate constitutional questions which the case presented at its inception.

I.

The essential purpose of this lawsuit by Congressman Powell and members of his constituency was to regain the seat from which he was barred by the 90th Congress. That purpose, however, became impossible of attainment on January 3, 1969, when the 90th Congress passed into history and the 91st Congress came into being. On that date, the petitioner's prayer for a judicial decree restraining enforcement of House Resolution No. 278 and commanding the respondents to admit Congressman Powell to membership in the 90th Congress became incontestably moot.

The petitioners assert that actions of the House of Representatives of the 91st Congress have prolonged the controversy raised by Powell's exclusion and preserved the need for a judicial declaration in this case. I believe, to the contrary, that the conduct of the present House of Representatives confirms the mootness of the petitioners' suit against the 90th Congress. Had Powell

been excluded from the 91st Congress, he might argue that there was a "continuing controversy" concerning the exclusion attacked in this case.¹ And such an argument might be sound even though the present House of Representatives is a distinct legislative body rather than a continuation of its predecessor,² and though any grievance caused by conduct of the 91st Congress is not redressable in this action. But on January 3, 1969, the House of Representatives of the 91st Congress admitted Congressman Powell to membership, and he now sits as the Representative of the 18th Congressional District of New York. With the 90th Congress terminated and Powell now a member of the 91st, it cannot seriously be contended that there remains a judicial controversy between these parties over the power of the House of Representatives to exclude Powell and the power of a court to order him reseated. Understandably, neither the Court nor the petitioners advance the wholly untenable proposition that the continuation of this case can be founded on the infinitely remote possibility that Congressman Powell, or any other Representative, may someday be excluded for the same reasons or in the same manner. And because no foreseeable possibility of such future conduct exists, the respondents have met their

¹ See, e. g., *United States v. Concentrated Phosphate Export Assn.*, 393 U. S. 199, 202-204; *Carroll v. President and Commissioners of Princess Ann*, 393 U. S. 175, 178-179.

² See *Gojack v. United States*, 384 U. S. 702, 707, n. 4 ("Neither the House of Representatives nor its committees are continuing bodies."); *McGrain v. Daugherty*, 273 U. S. 135, 181. Forty-one of the present members of the House were not members of the 90th Congress; and two of the named defendants in this action, Messrs. Moore and Curtis, are no longer members of the House of Representatives. Moreover, the officer-employees of the House, such as the Sergeant-at-Arms, are re-elected by each new Congress. See n. 15, *infra*.

heavy burden of showing that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn.*, 393 U. S. 199, 203.³

The petitioners further argue that this case cannot be deemed moot because of the principle that "the voluntary abandonment of a practice does not relieve a court of adjudicating its legality" *Gray v. Sanders*, 372 U. S. 368, 376.⁴ I think it manifest, however, that this principle and the cases enunciating it have no application to the present case. In the first place, this case does not involve "the voluntary abandonment of a practice." Rather it became moot because of an event over which the respondents had no control—the expiration of the 90th Congress. Moreover, unlike the cases relied on by the petitioners, there has here been no on-going course of conduct of indefinite duration against which a permanent injunction is necessary. Thus, it cannot be said of the respondents' actions in this case, as it was of the conduct sought to be enjoined in *Gray*, for example, that "the practice is deeply rooted and long standing," *id.*, or that, without judicial relief, the respondents would be "free to return to [their] old ways." *United States*

³ See also *United States v. W. T. Grant Co.*, 345 U. S. 629, 633; *United States v. Aluminum Co. of America*, 148 F. 2d 416, 448. The Court has only recently concluded that there was no "controversy" in *Golden v. Zwickler*, — U. S. —, because of "the fact that it was most unlikely that the congressman would again be a candidate for Congress." *Id.*, at —. It can hardly be maintained that the likelihood of the House of Representatives' again excluding Powell is any greater.

⁴ See also *United States v. W. T. Grant Co.*, 345 U. S. 629, 632-633; *Local 74, United Bhd of Carpenters & Joiners v. NLRB*, 341 U. S. 707, 715; *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37, 43; *Hecht Co. v. Bowles*, 321 U. S. 321, 327; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 307-310.

v. *W. T. Grant Co.*, 345 U. S. 629, 632.⁵ Finally, and most important, the "voluntary abandonment" rule does not dispense with the requirement of a continuing controversy, nor could it under the definition of the judicial power in Article III of the Constitution. Voluntary cessation of unlawful conduct *does* make a case moot "if the defendant can demonstrate that "there is no reasonable expectation that the wrong will be repeated.'" *Id.*, at 633.⁶ Since that is the situation here, the case would be moot even if it could be said that it became so by the House's "voluntary abandonment" of its "practice" of excluding Congressman Powell.

With the exception of *Gray*, the "continuing controversy" cases relied on by the petitioners were actions by the Government or its agencies to halt illegal conduct of the defendants, and, by example, of others engaged in similar conduct. See cases cited, *supra*, nn. 1, 3, 4. The principle that voluntary abandonment of an illegal practice will not make an action moot is especially, if not exclusively, applicable to such public law enforcement suits.

"Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights . . . of the public, the enforcement of which the Government has endeavored to procure by a judgment of a court The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by [voluntary cessation of the challenged conduct]." *United States v. Trans-Missouri Freight Assn.*, 166 U. S., at 309.

The considerations of public enforcement of a statutory or regulatory scheme which inhere in those cases are not present in this litigation.

⁶ Certainly in every decision relied on by the petitioners the Court did not reject the mootness argument solely on the ground that the illegal practice had been voluntarily terminated. In each it proceeded to determine that there was in fact a continuing controversy.

The petitioners' proposition that conduct of the 91st Congress has perpetuated the controversy is based on the fact that House Resolution No. 2—the same resolution by which the House voted to seat Powell—fined him \$25,000 and provided that his seniority was to commence as of the date he became a member of the 91st Congress.⁷ That punishment, it is said, "arises out of the prior actions of the House which originally impelled this action." It is indisputable, however, that punishment of a House member involves constitutional issues entirely distinct from those raised by exclusion,⁸ and that a punishment in one Congress is in no legal sense a "continuation" of an exclusion from the previous Congress. A judicial determination that the exclusion was improper would have no bearing on the constitutionality of the

⁷ House Resolution No. 2 provided in pertinent part:

"(2) That as punishment Adam Clayton Powell be and he hereby is fined the sum of \$25,000, said sum to be paid to the Clerk to be disposed of by him according to law. The Sergeant at Arms of the House is directed to deduct \$1,150 per month from the salary otherwise due the said Adam Clayton Powell, and pay the same to said Clerk until said \$25,000 fine is fully paid.

"(3) That as further punishment the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 91st Congress."

The petitioners' argument that the case is kept alive by Powell's loss of seniority, see *ante*, at —, is founded on the mistaken assumption that the loss of seniority is attributable to the exclusion from the 90th Congress and that seniority would automatically be restored if that exclusion were declared unconstitutional. But the fact is that Powell was stripped of seniority by the action of the 91st Congress, action which is not involved in this case and which would not be affected by judicial review of the exclusion from the 90th Congress. Moreover, even if the conduct of the 91st Congress were challenged in this case, the Court would clearly have no power whatsoever to pass upon the propriety of such internal affairs of the House of Representatives.

⁸ Article I, § 5, of the Constitution specifically empowers each House to "punish its Members for disorderly Behaviour."

punishment, nor any conceivable practical impact on Powell's status in the 91st Congress. It is thus clear that the only connection between the exclusion by the 90th Congress and the punishment by the 91st is that they were evidently based on the same asserted derelictions of Congressman Powell. But this action was not brought to exonerate Powell or to expunge the legislative findings of his wrong-doing; its only purpose was to restrain the action taken in consequence of those findings—Powell's exclusion.

Equally without substance is the petitioners' contention that this case is saved from mootness by application of the asserted "principle" that a case challenging allegedly unconstitutional conduct cannot be rendered moot by further unconstitutional conduct of the defendants. Under this hypothesis, it is said that the "Court can not determine that the conduct of the House on January 3, 1969 has mooted this controversy without inferentially, at least, holding that the action of the House of that day was legal and constitutionally permissible." If there is in our jurisprudence any doctrine remotely resembling the petitioners' theory—which they offer without reference to any authority—it has no conceivable relevance to this case. For the events of January 3, 1969 that made this case moot were the termination of the 90th Congress and Powell's seating in the 91st, *not* the punishment which the petitioners allege to have been unconstitutional. That punishment is wholly irrelevant to the question of mootness and is in no wise before the Court in this case.

II.

The passage of time and intervening events have, therefore, made it impossible to afford the petitioners the principal relief they sought in this case. If any aspect of the case remains alive, it is only Congressman

Powell's individual claim for the salary of which he was deprived by his absence from the 90th Congress.⁹ But even if that claim can be said to prevent this controversy from being moot, which I doubt, there is no need to reach the fundamental constitutional issues that the Court today undertakes to decide.

This Court has not in the past found that an incidental claim for back pay preserves the controversy between a legislator and the legislative body which evicted him, once the term of his eviction has expired. *Alejandrino v. Quezon*, 271 U. S. 528, was a case nearly identical to that before the Court today. The petitioner was a member of the Senate of the Philippines who had been suspended for one year for assaulting a colleague. He brought an action in the Supreme Court of the Philippines against the elected members of the Senate¹⁰ and its officers and employees (the President, Secretary, Sergeant-at-Arms, and Paymaster), seeking a writ of mandamus and an injunction restoring him to his seat and to all the privileges and emoluments of office. The Supreme Court of the Philippines dismissed the action for want of jurisdiction and Alejandrino brought the case here,¹¹ arguing that the suspension was not authorized by the Philippine Autonomy Act, a statute which incor-

⁹ The salary claim is personal to Congressman Powell, and the other petitioners therefore clearly have no further interest in this lawsuit.

¹⁰ The Philippines Senate was composed of 24 Senators, 22 of whom were elected, and two of whom were appointed by the Governor General. Alejandrino was one of the two appointees. See 271 U. S., at 531-532.

¹¹ Under the Philippine Autonomy Act, 39 Stat. 545, this Court had jurisdiction to examine by writ of error the final judgments and decrees of the Supreme Court of the Philippine Islands in cases under the Constitution or statutes of the United States. A subsequent statute substituted the writ of certiorari. 39 Stat. 726.

porated most of the provisions of Article I of the United States Constitution.¹²

Because the period of the suspension had expired while the case was pending on certiorari, a unanimous Court, in an opinion by Chief Justice Taft, vacated the judgment and remanded the case with directions to dismiss it as moot. To Alejandrino's claim that his right to back pay kept the case alive, the Court gave the following answer, which, because of its particular pertinency to this case, I quote at length:

"It may be suggested, as an objection to our vacating the action of the court below, and directing the dismissal of the petition as having become a moot case, that, while the lapse of time has made unnecessary and futile a writ of mandamus to restore Senator Alejandrino to the Island Senate, there still remains a right on his part to the recovery of his emoluments, which were withheld during his suspension, and that we ought to retain the case for the purpose of determining whether he may not have a mandamus for this purpose. . . . It is difficult for the Court to deal with this feature of the case, which is really only a mere incident to the

¹² "Section 18 [of the Autonomy Act] provides that the Senate and House respectively shall be the sole judges of the elections, returns and qualifications of their elective members, and each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel an elective member. The Senators and Representatives shall receive an annual compensation for their services to be ascertained by law and paid out of the Treasury of the Philippine Islands. Senators and Representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place." 271 U. S., at 532.

main question made in the petition and considered in the able and extended brief of counsel for the petitioner, and the only brief before us. That brief is not in any part of it directed to the subject of emoluments, nor does it refer us to any statute or to the rules of the Senate by which the method of paying Senators' salaries is provided, or in a definite way describe the duties of the officer or officers or committee charged with the ministerial function of paying them.

"... the remedy of the Senator would seem to be by mandamus to compel such official in the discharge of his ministerial duty to pay him the salary due, and the presence of the Senate as a party would be unnecessary. Should that official rely upon the resolution of the Senate as a reason for refusing to comply with his duty to pay Senators, the validity of such a defense and the validity of the resolution might become a judicial question affecting the personal right of the complaining Senator, properly to be disposed of in such action, but not requiring the presence of the Senate as a party for its adjudication. The right of the petitioner to his salary does not therefore involve the very serious issue raised in this petition as to the power of the Philippine Supreme Court to compel by mandamus one of the two legislative bodies constituting the legislative branch of the Government to rescind a resolution adopted by it in asserted lawful discipline of one of its members, for disorder and breach of privilege. We think, now that the main question as to the validity of the suspension has become moot, the incidental issue as to the remedy which the suspended Senator may have in recovery of his emoluments, if illegally withheld, should properly be tried

in a separate proceeding against an executive officer or officers as described. As we are not able to derive from the petition sufficient information upon which properly to afford such a remedy, we must treat the whole cause as moot and act accordingly. This action on our part of course is without prejudice to a suit by Senator Alejandrino against the proper executive officer or committee by way of mandamus or otherwise to obtain payment of the salary which may have been unlawfully withheld from him." 271 U. S., at 533, 534-535.¹³

¹³ The petitioners rely on the following passage from *Bond v. Floyd*, 385 U. S. 116, 128, n. 4, as dispositive of their contention that the salary claim prevents this case from being moot:

"A question was raised in oral argument as to whether this case might not be moot since the session of the House which excluded Bond was no longer in existence. The State has not pressed this argument, and it could not do so, because the State has stipulated that if Bond succeeds on this appeal he will receive back salary for the term from which he was excluded."

I do not believe that this off-hand dictum in *Bond* is determinative of the issue of mootness in this case. In the first place, as the Court in *Bond* noted, it was not there contended by any party that the case was moot. Moreover, contrary to the implication of the statement, the legislative term from which Bond was excluded had not ended at the time of the Court's decision. (The Court's decision was announced on December 5, 1966; Bond's term of office expired on December 31, 1966.) In any event, he had not been seated in a subsequent term, so the continuing controversy had not been rendered clearly moot by any action of the Georgia House, as it has here by the House of Representatives of the 91st Congress. No one suggested in *Bond* that the money claim was the only issue left in the case. Furthermore, the considerations which governed the Court's decision in *Alejandrino* were simply not present in *Bond*. Because of the State's stipulation, there was no doubt, as there is here, see *infra*, at —, that the Court's decision would lead to effective relief with respect to Bond's salary claim. And finally, there was no suggestion that Bond had an alternative remedy, as Powell has here, see *infra*, at —, by which he could obtain full relief without requiring the Court to decide novel and delicate constitutional issues.

Both of the factors on which the Court relied in *Alejandro* are present in this case. Indeed, the salary claim is an even more incidental and subordinate aspect of this case than it was of *Alejandro*.¹⁴ And the availability of effective relief for that claim against any of the present respondents is far from certain. As in *Alejandro*, the briefs and memoranda submitted by the parties in this case contain virtually no discussion of this question—the only question of remedy remaining in the case. It appears from relevant provisions of law, however, that the Sergeant-at-Arms of the House—an official newly elected by each Congress¹⁵—is responsible for the retention and disbursement to Congressmen of the funds appropriated for their salaries. These funds are payable from the United States Treasury¹⁶ upon requisitions presented by the Sergeant-at-Arms, who is entrusted with keeping the books and accounts “for the compensation and mileage of Members.”¹⁷ A Congressman who has presented his credentials and taken the oath of office¹⁸ is entitled to be paid monthly on the basis of certificates of the Clerk¹⁹ and Speaker of the House.²⁰ Powell’s prayer for a mandamus and an injunction against the Sergeant-at-Arms is presumably based on this statutory scheme.

Several important questions remain unanswered, however, on this record. Is the Sergeant-at-Arms the only necessary defendant? If so, the case is surely moot as to the other respondents, including the House mem-

¹⁴ *Alejandro* was the only petitioner in the case, and since he was an appointed Senator, it appears that there was no group of voters who remained without representation of their choice in the Senate during his suspension.

¹⁵ 2 U. S. C. § 83.

¹⁶ U. S. Const., Art. I, § 6; 2 U. S. C. § 47.

¹⁷ 2 U. S. C. §§ 80, 78.

¹⁸ 2 U. S. C. § 35.

¹⁹ 2 U. S. C. § 34.

²⁰ 2 U. S. C. § 48.

bers, and they should be dismissed as parties on that ground rather than after resolution of difficult constitutional questions under the Speech and Debate Clause. But it is far from clear that Powell has an appropriate or adequate remedy against the remaining respondents. For if the Speaker does not issue the requisite certificates and Congress does not rescind Resolution 278, can the House agents be enjoined to act in direct contravention of the orders of their employers? Moreover, the office of Sergeant-at-Arms of the 90th Congress has now expired, and the present Sergeant-at-Arms serves the 91st Congress. If he were made a party in that capacity, would he have the authority—or could the 91st Congress confer the authority—to disburse money for a salary owed to a Representative in the previous Congress, particularly one who never took the oath of office? Presumably funds have not been appropriated to the 91st Congress or requisitioned by its Sergeant-at-Arms for the payment of salaries to members of prior Congresses. Nor is it ascertainable from this record whether money appropriated for Powell's salary by the 90th Congress, if any, remains at the disposal of the current House and its Sergeant-at-Arms.²¹

There are, then substantial questions as to whether, on his salary claim, Powell could obtain relief against any or all of these respondents. On the other hand, if he was entitled to salary as a member of the 90th Congress, he has a certain and completely satisfactory remedy

²¹ The respondents allege without contradiction that the Sergeant-at-Arms does not have sufficient funds to pay Congressman Powell's back salary claims. Separate appropriations for the salaries of Congressmen are made in each fiscal year, see, e. g., 80 Stat. 354, 81 Stat. 127, 82 Stat. 398, and, according to the respondents, "it is the custom of the Sergeant to turn back to the Treasury all unexpended funds at the end of each fiscal year." Thus, the only funds still held by the Sergeant are said to be those appropriated for the present fiscal year commencing July 1, 1968.

in an action for a money judgment against the United States in the Court of Claims.²² While that court could not have ordered Powell reseated or entered a declaratory judgment on the constitutionality of his exclusion,²³ it is not disputed that the Court of Claims could grant him a money judgment for lost salary on the ground that his discharge from the House violated the Constitution. I would remit Congressman Powell to that remedy, and not simply because of the serious doubts about the availability of the one he now pursues. Even if the mandatory relief sought by Powell is appropriate and could be effective, the Court should insist that the salary claim be litigated in a context that would clearly obviate the need to decide some of the constitutional questions with which the Court grapples today, and might avoid them altogether.²⁴ In an action in the Court of Claims for a money judgment against the United States, there would be no question concerning the impact of the Speech

²² "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, . . ." 28 U. S. C. § 1491. The district courts have concurrent jurisdiction over such claims only in amounts less than \$10,000. 28 U. S. C. § 1346.

²³ *United States v. King*, — U. S. —. The petitioners suggest that the inability of the Court of Claims to grant such relief might make any remedy in that court inadequate. But since Powell's only remaining interest in the case is to collect his salary, a money judgment in the Court of Claims would be just as good as, and probably better than, mandatory relief against the agents of the House. The petitioners also suggest that the Court of Claims would be unable to grant relief because of the pendency of Powell's claim in another court, 28 U. S. C. § 1500, but that would, of course, constitute no obstacle if, as I suggest, the Court should order this action dismissed on grounds of mootness.

²⁴ It is possible, for example, that the United States in such an action would not deny Powell's entitlement to the salary but would seek to offset that sum against the amounts which Powell was found by the House to have appropriated unlawfully from Government coffers to his own use.

and Debate Clause on a suit against members of the House of Representatives and their agents, and questions of jurisdiction and justiciability would, if raised at all, be in vastly different and more conventional form.

In short, dismissal of Powell's action against the legislative branch would not in the slightest prejudice his money claim,²⁵ and it would avoid the necessity of deciding constitutional issues which, in the petitioners' words, "touch the bedrock of our political system [and] strike at the very heart of representative government." If the fundamental principles restraining courts from unnecessarily or prematurely reaching out to decide grave and perhaps unsettling constitutional questions retain any vitality, see *Ashwander v. TVA*, 297 U. S. 288, 346-348 (Brandeis, J., concurring), surely there have been few cases more demanding of their application than this one. And those principles are entitled to special respect in suits, like this suit, for declaratory and injunctive relief, which it is within a court's broad discretion to withhold. "We have cautioned against declaratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations." *Public Affairs Press v. Rickover*, 369 U. S. 111, 112. "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear,

²⁵ Relying on *Bank of Marin v. England*, 385 U. S. 99, 101, the petitioners complain that it would impose undue hardship on Powell to force him to "start all over again" now that he has come this far in the present suit. In view of the Court's remand of this case for further proceedings with respect to Powell's remedy, it is at least doubtful that remitting him to an action in the Court of Claims would entail much more cost and delay than will be involved in the present case. And the inconvenience to litigants of further delay or litigation has never been deemed to justify departure from the sound principle, rooted in the Constitution, that important issues of constitutional law should be decided only if necessary and in cases presenting concrete and living controversies.

not remote or speculative." *Eccles v. Peoples Bank of Lakewood Village*, 333 U. S. 426, 431.

If this lawsuit is to be prolonged, I would at the very least not reach the merits without ascertaining that a decision can lead to some effective relief. The Court's remand for determination of that question implicitly recognizes that there may be no remaining controversy between the Petitioner Powell and any of these respondents redressable by a court, and that its opinion today may be wholly advisory. But I see no good reason for any court even to pass on the question of the availability of relief against any of these respondents. Because the essential purpose of the action against them is no longer attainable and Powell has a fully adequate and far more appropriate remedy for his incidental back pay claim, I would withhold the discretionary relief prayed for and terminate this lawsuit now. Powell's *claim* for salary may not be dead, but this *case* against all these respondents is truly moot. Accordingly, I would vacate the judgment below and remand the case with directions to dismiss the complaint.

